(App. 91)[1] However, no legitimate foreign custody order was submitted. Petitioner filed a motion to seek judicial enforcement of his parental rights after Ms. Synclair disobeyed Fresno County custody orders by refusing all contact and communication with their son.

Superior Court Judge Nancy Cisneros issued an Order After Hearing dated November 3, 2000. The Court stated Fresno has jurisdiction (App. 83) on the issue of custody and directed Respondents' Mr. Frank and the District Attorney's office to cooperate with American and Russian federal authorities (App. 84) following Mr. Synclair's complaint of child abduction. The matter was never disputed, in particular by the Respondents. No motion to vacate or modify the Order After Hearing was filed by either party thereafter.

After several requests by Petitioner to Respondents' Ron Hopper and the Child Abduction Unit to comply with the November 3, 2000 order, a letter was mailed to Petitioner by the Respondents' District Attorney's office, District Attorney Edward Hunt, and Assistant District Attorney Dennis Lewis, dated April 13, 2001. The letter stated it would not comply to the judge's order because "any order issued absent proper jurisdiction is void ab initio." (App. 80) [2] Furthermore, the letter stated "the only proper action

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[1] Paragraph 5.03

[2] Second paragraph.

for this office would be to ask the Fresno County Superior Court to vacate all order subsequent to the find that Russia is the home state of Larry Synclair Jr." (App. 80)[3] However, the Respondents never followed with their written intention a motion to vacate the court order.

On December 6, 2001, Petitioner filed a federal complaint against Respondents pursuant to 42 USC §1983 alleging violations of procedural and substantive due process. An Amended Complaint At Law was later filed on March 12, 2002, reiterating the action was brought by Petitioner "who was subjected to constitutional due process and substantive due process violations by Respondents under color of law for administrative nonprosecutorial conduct in failing to obey a November 3, 2000 Order of the Superior Court of the County of Fresno" (App. 65). The amended complaint clearly states "the domestic custody order is not challenged in this action" (App. 65). Petitioner alleges that without complying to proper procedures to file a motion to vacate or modify the court order, or seek an appeal through a higher court, the Respondents' created policies and procedures, through various administrative failures conducted under color of law, thereby violating the Petitioner's Fourteenth Amendment rights.

Petitioner alleges Respondents' failure to comply and misuse of legal procedure, acting in the shadow of

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[3] First paragraph.

arrogance and power, blatantly chose to ignore the November 3, 2000 court order that resulted not only in violating Mr. Synclair's constitutional rights of due process, but resulted in emotional duress that required psychiatric counseling for post traumatic stress disorder (App. 93).

After filing the federal complaint, the Fresno County Court granted on January 2, 2002, Petitioner's motion for his case *Synclair v Synclair* to be transferred to the Superior Court of California, County of San Diego, North Division Branch (App. 77).

During May of the same year, the District Court denied Respondents' motion to dismiss the first amended complaint. In its "Memorandum Opinion and Order Re Motion to Dismiss First Amended Complaint" the court noted "Defendants do not discuss whether the rights to procedural and substantive due process were clearly established, and therefore appear to concede that point" (App. 59).

In 2002, Mr. Synclair filed a Motion for Sole Custody before Judge Jeffrey Barton of the Superior Court of California, County of San Diego, North Division Branch. After two failed attempts by the San Diego County Court to communicate with a Moscow court whether there was a custody order or an issue pertaining to jurisdiction in Russia, the San Diego County Court ruled on December 20, 2002 that "this court finds that is has jurisdiction to make

and enforce child custody and visitation orders" (App. 40) The court also awarded sole custody to Petitioner (App. 43).

On March 19, 2003, enforcement of the custody order was adhered by San Diego County officials. A state felony warrant was issued by the Child Abduction Unit of the San Diego County District Attorney's office for the arrest of Svetlana Synclair. The felony charge is child abduction under California Penal Code 278.5.

In essence, the County of San Diego lawfully recognized and complied with Fresno County Court's Order After Hearing dated November 3, 2000.Federal authorities were notified. Larry Jr.'s name was listed in the NCIC. The federally-funded National Center for Missing and Exploited Children issued printed alerts about the abduction including a past photo and age progression photo of Larry Jr., and the photo of Ms. Synclair.

On June 20, 2003 Petitioner filed "Plaintiff's Statement of Undisputed Facts in Re Defendants' Motion for Summary Judgment" (App. 29-33). The documentation clearly states facts with a list of supporting evidence (taken from Respondents' deposition testimony) regarding allegations that the Respondents' knew of the court order, had a legal duty to enforce the court order, was aware of the policies regarding motion to vacate or modify an order, and chose not to comply with said order. Additionally, the statement of undisputed facts noted other authorities

outside of Fresno County, in this case San Diego County, affirmed the order and exercised jurisdiction.

However, on July 30, 2003, the District Court's ruled it would close the case in observance of the *Rooker-Feldman* Doctrine (App. 27-28)[4]. The Court believes the superior court decision and the case presented to District Court were "inextricably intertwined." It noted, "Respondents move for summary judgment on the grounds of qualified immunity, lack of individual capacity liability, lack of official capacity and lack of municipal liability. The court finds that in order to rule on the merits of this case, this court must decide the constitutionality of the decision of the District Attorney's Office outlined in the letter of April 13, 2001" (App. 27).

On December 6, 2004, the Ninth Circuit affirmed the District Court's ruling citing *Bianchi v. Rylaarsdam*, 334 F3d 895, 898-90. In *Synclair v. County of Fresno* (9th Cir., 2004) 115 Fed. Appx. 395 "the federal court would have to rule on the constitutionality of the county officials' actions which are "inextricably intertwined" with the validity of a state court order" (App. 3).

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[4] Relying on *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), the Court in *District. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485 (1983) set forth the rule known as the *Rooker-Feldman* doctrine, that federal district courts lack subject matter jurisdiction to review final adjudications of a state's highest court.

On February 4, 2005, the Ninth Circuit denied Petitioner's petition for panel rehearing (App. 1).

REASONS FOR GRANTING THE PETITION

The Fourteenth Amendment excludes the State from depriving any person of life, liberty, or property without due process of law.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...."

It has been long recognized by this Court that "the Due Process Clause guarantees more than fair process." *Washington v. Glucksberg,* 521 U.S. 702, 719, 117 S.Ct. 2258, 2267 (1997). It also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," Id., at 720; see also *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S. Ct. 1439, 1447 (1993). Any denial of Due Process must be tested by the "totality of the

facts" because a lack of Due Process may "constitute a denial of fundamental fairness, shocking to the universal sense of justice..." *Malloy v. Hogan,* 378 U.S. 1, 26 (1964) (quoting from *Betts* v. *Brady*, 316 U.S. 455, 462 (1942))

Additionally, "the parent-child relationship is a liberty interest protected by the Due Process Clause of the 14th Amendment." *Bell v. City of Milwaukee,* 746 F.2d 1205, 1244 (7th Cir. 1985). A State may not interfere with a parent's custodial rights absent due process protections. "No bond is more precious and none should be more zealously protected by the law as the bond between parent and child." *Carson v. Elrod,* 411 F. Supp. 645, 649 (1976). Should a governmental entity interfere with these rights, they can be held liable for injury. "Where custody has been unreasonably denied by officials acting under color of law, a Section 1983 remedy for injury to the parent-child associational interest has been provided." *Bell v. City of Milwaukee,* 746 F.2d 1205, 1244 (7th Cir. 1985).

The solely administrative act of the Respondents, which originates from their letter dated April 13, 2001, does not reflect standard court procedures. It demonstrates their personal intent to thumb their nose to this country's Fourteenth Amendment and, in particular, the judicial system. Such disobedience to the court order denied the due process rights of the Petitioner. As this Court noted in *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 535 (1886) constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty

of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." This Court also noted such acts committed by individuals of governmental entities are not acceptable. "It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the right secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly over zealous, executive officers." *Gouled v. United States,* 255 U. S. 298, 304, 41 S.Ct. 261, 263 (1921).

I. The issue of clarifying the parameters of the Rooker-Feldman doctrine raised in this case is of national importance.

The issue brought forth in this case asks what are the set boundaries for a federal district court to have jurisdiction to a Section 1983 case regarding governmental interference of a citizen's due process rights. As listed above, it is a fundamentally constitutionally protected right. But, the District Court noted in its decision, in order to rule on the merits of this case, it would have to decide the constitutionality of the decision of the District Attorney's Office "in the letter of April 13, 2001"(App. 27). Do the parameters of the *Rooker-Feldman* doctrine include prohibiting a court from jurisdiction on reviewing non-court documents? The Seventh Circuit disagrees. "*Rooker-Feldman* doctrine, precluding district court review of final judgment of state court in judicial proceedings, does not

apply to administrative decisions." *Van Harken v. City of Chicago*, 103 F.3d 1346, 65 USLW 2450 (7th Cir., 1997).

A. The doctrine must apply to proceedings only judicial in nature, not administrative.

The Ninth Circuit's affirmation of the U.S. District Court's ruling contradicts the Seventh Circuit's decision of what applies to the *Rooker-Feldman* doctrine. As the District Court's stated, it is barred from having jurisdiction because it would have to consider an administrative letter written by Respondents. The Seventh Circuit recognizes the *Rooker-Feldman* doctrine applies only to state court proceedings which were judicial in nature. "A district court, however, may have jurisdiction when the litigants' challenge is not directed at a state court's judicial proceedings, but rather involves a state court's administrative, legislative, or ministerial actions, the facts of Feldman illustrates this difference." *Leaf v. Supreme Court of the State of Wisconsin*, 979 F.2d 589, 596 (7th Cir. 1992).

The Ninth Circuit also fails to demonstrate in its opinion how the non-judicial administrative acts by the Respondents, in this case a one page letter that is not a court document or functions similar as a court document, can be interpreted as "inextricably intertwined" to a state court decision, when in fact the Petitioner does not seek any review of a state court judgment. The Ninth Circuit cites

Bianchi[5], but within the pages of *Bianchi* there's no mention how a District Court is barred from a 1983 claim in which injury stemmed from an administrative act or a non-judicial document.

The Petitioner's injury originated not from a lower court decision, but from the non-legal, non-court related personal letter by the Respondents that is not judicial in nature. "The fundamental and appropriate question to ask is whether injury alleged by the federal plaintiff resulted from a state court judgment itself or is distinct from that judgment. If the injury alleged resulted from the state court judgment itself, *Rooker-Feldman* directs that the lower federal courts lack jurisdiction." *Garry v. Geils* 82 F3d 1362, 1365 (7th Cir., 1996).

Respondent Dennis Lewis, acting under color of law, stated in his April 13, 2001 letter that the court never had jurisdiction "ab initio" and therefore would not enforce an "invalid court order" (App. 80) The Respondent provides no explanation what constitutes the court order as invalid although other judicial and legal officials in California complied. His recommendation in the letter was to vacate the court order, yet he never followed through. The letter had no legal association with the November 3, 2000 court order. It was not a legal document that initiated a motion under court policies, nor did it affect the validity

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[5] *Bianchi v. Rylaarsdam,* 334 F3d 895, 898-90, (9th Cir. 2003)

of November 3, 2000 court order. The Respondent's act was purely administrative outside of standard court procedures, which would be filing a motion for appeal or a motion to vacate or modify the order. As the Fourth Circuit has observed, "Other courts of appeals have concluded that the *Rooker-Feldman* doctrine does not apply to the administrative 'judgments'." *Moore v. Asheville, North Carolina,* 396 F 3d 385, 392 (4th Cir., 2005)

In essence, Respondent Lewis' personal letter was not "inextricably intertwined" with a court decision, but purely an independent decision separate from the rules of court procedures.

B. The doctrine must apply only if the injury originated from a state court decision.

Both parties never disputed the decision of the superior court order on November 3, 2000. In fact, the Respondents had legal and reasonable opportunity within a time frame to appeal the decision to a higher court, or file a motion to vacate or modify it. Instead, Respondents opted to disregard court procedures and construct a non-court document in the form of a personal letter, which would not be filed with the court case as a functionary tool such as a motion. That letter would be the crux of inflicting injury to Petitioner. *Gorzelanczyk v. Baldassone,* 29 Fed.Appx. 402, 403 (7th Cir. 2002). The pivotal question, then, is "whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that

judgment." In this case, a personal letter. In *Leaf,* 979 F.2d at 596 "We elaborated that if the injury alleged by the federal plaintiff was due to the 'non-judicial' actions of a state court, i.e. if the injury did not 'arise out of judicial proceedings', lower federal courts could have jurisdiction."

II. Under the *Rooker-Feldman* doctrine, a District Court should not be barred from jurisdiction when an administrative document is used to circumvent a judicial decision, thereby stripping a citizen's 14th Amendment rights of due process?

The Ninth Circuit's support of the District Court's application of the *Rooker-Feldman* doctrine in this case, implies a potentially dangerous precedent that a non-judicial administrative letter could have equal impact or superior to a judicial court order.

As stated earlier, the core of the Petitioner's complaint before the U.S. District Court focused on the constitutional issue of procedural and substantive due process. A procedural due process claim is based on "a denial of fundamental procedural fairness," while a substantive claim is based on the "exercise of power without any reasonable justification in the service of legitimate governmental objective." *County of Sacramento v. Lewis,* 523 U.S. 833, 845-46, 118 S.Ct. 1708, 1716 (1998). The Order After Hearing, dated November 3 2000, reflects how the superior court rightfully granted Petitioner his due process rights under the Fourteenth Amendment to

the U.S. Constitution: the right to adequate notice, an opportunity to be heard, an opportunity to cross examine witnesses, to present evidence, and so forth.

However, the Respondents' administrative act, acting under color of law, violated the Petitioner's Fourteenth Amendment rights. The letter written by the Respondents' created a situation for the Petitioner to believe his right to adequate notice, an opportunity to be heard, an opportunity to cross examine witnesses, to present evidence, was moot. Petitioner was informed he would have no reasonable opportunity to litigate because, according to the Respondents, the court did not have jurisdiction. In other words, the non-legal non-court document written by the Respondents told Petitioner that the November 3, 2000 court decision was illegal.

The action committed by the Respondents, that is, informing him a state court decision was void wrongfully misled him to believe he would have no opportunity for further litigation. Petitioner was falsely informed in the Respondents' letter that the custody order was invalid, his rights as a parent would not be recognized or enforced by Fresno County, because any and all prior court decision by the County of Fresno was "void ab initio" (App. 80) As affirmed by *Powell v Powell*, 80 F.3d 464, 467 (11th Cir. 1996) "This court has recognized an 'important limitation' on the *Rooker-Feldman* doctrine when the plaintiff has no 'reasonable opportunity to raise his federal claim in state proceedings.'"

The act of the Respondents, that is the District Attorney's office and defendants within this entity overstepped their authority in accordance to California Family Codes. The district attorney is required to represent the court and take all actions necessary to enforce its order, not have the same duties equal or greater than to a superior court judge. Section 3130 of the California Family Code provides as follows:

> (a) "If a petition to determine custody of a child has been filed in court of competent jurisdiction, or if a temporary order pending determination of custody has been entered...and the whereabouts of a party in possession of the are not known,...the District Attorney shall take all action necessary to locate the party and the child and to procure compliance with the order to appear with the child for the purposes adjudication of custody. The petition to determine custody may be filled by the District Attorney."

Section 3131 of the California Family Code provides as follows:

> "If a custody or visitation order has been entered by a court of competent jurisdiction and the child is taken or detained by another person in violation of the order, the district

> attorney shall take all actions necessary to locate and return the child and the person who violated the order and to assist in the enforcement of the custody or visitation order or other order of the court by use of an appropriate civil or criminal proceeding."

No state or federal statute can be found that says a district attorney or a local government entity, such as a deputy district attorney, can overlook, disregard, ignore, or refuse to enforce a court order.

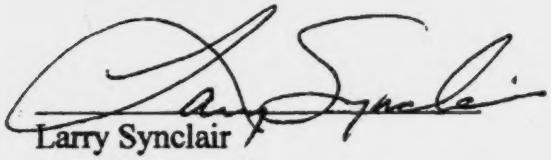
CONCLUSION

To affirm a federal court decision that a non-binding, non-court documented letter is "inextricably intertwined" to a superior court decision opens the door for Petitioners, such as Mr. Synclair, to fall victim to those like the Respondents, acting under color of law, who prefer to decide what court decision is legitimate or "void ab initio." While the *Rooker-Feldman* doctrine lawfully bars district courts from having jurisdiction to review state court decisions, the boundaries of the doctrine must be clearly defined so district courts can continue to protect the constitutional rights of persons from entities with intentions to deny those rights. *Gross v. State of Illinois* (1963) 312 F 2d 257 "State Judges, as well as federal, have the responsibility to respect and protect persons from violations of federal constitutional rights.

The Petitioner respectfully requests this honorable Court to remand the case to the U.S. District Court with instructions to focus solely on the issue of whether the Respondents' administrative actions were compliant with the Fourteenth Amendment, or, should this Court affirm the District Court's decision that an non-court binding letter can be "inextricably intertwined" to a state court decision, the Petitioner respectfully asks the case to placed before a court in the state of California, so he may the reasonable opportunity to raise his federal claim in state proceedings.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Larry Synclair
Appellant Pro Se

July 4 2005
Date

FILED FEB 04 2005
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY SYNCLAIR, SR., individually ad as a parent of Larry Synclair, Jr. a minor,

Plaintiff - Appellant,

V.

COUNTY OF FRESNO; et al.,

Defendants - Appellees.

No. 03-16910
D.C. No. CV-01-06546-AWI
Eastern California
(Fresno)

ORDER

Before: GOODWIN, WALLACE and TROTT, Circuit Judges.

Appellant's petition for panel rehearing is denied.
No further filings will be accepted in this closed appeal.

FILED DEC 14 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY SYNCLAIR, SR., individually and as a parent of Larry Synclair, Jr. a minor,

Plaintiff - Appellant,

V.

COUNTY OF FRESNO; et al.,

Defendants - Appellees.

No. 03-16910
D.C. No. CV-01-06546-AWI

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit as provided by Ninth Circuit Rule 36-3.

Anthony W. Ishii, District Judge, Presiding

Submitted December 6, 2004**

Before: GOODWIN, WALLACE and TROTT, Circuit Judges.

Larry Synclair Sr. appeals pro se the district court's order dismissing, for lack of subject matter jurisdiction, his 42 U.S.C. § 1983 action alleging that officials of the County of Fresno violated his constitutional rights. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo. *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003). We affirm.

The district court properly dismissed Synclair's claims based on the *Rooker-Feldman* doctrine because to greant him the requested relief, the federal court would have to rule on the constitutionality of the courty officials' actions which are "inextricably intertwined" with the validity of a state court order. *See Bianchi*, 334 F.3d at 898-90.

AFFIRMED

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

APP. 4

CLOSED DATE 7/30/03 8✓

FILED 2003 JUL 30 P 3:27
Clerk, US Dist. Court
Eastern Dist. Of Calif.
At Fresno
By /s/ deputy

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY SYNCLAIR, SR., individually and as a parent of LARRY SYNCLAIR JR., a minor,

Plaintiff,

v.

COUNTY OF FRESNO, DEPARTMENT OF CHILD ABDUCTION UNIT, AND WILLIAM FRANK, RON HOPPER, DENNIS LEWIS, EDWARD HUNT, AND KATHY MACKIE, individually,

Defendants,

CV F 01-6546 AWI DLB

MEMORANDUM OPINION AND ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Larry Synclair, Sr. ("Synclair") is pursuing this civil action for damages and injunctive relief pursuant to 42 U.S.C. § 1983 alleging violations of Plaintiff's right to procedural due process and substantive due process. Plaintiff asserts the existence of federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and venue is proper in this district. Pending before the court is Defendants' motion for summary judgment.

Procedural History

The original complaint in this action was filed on December 11, 2001. On January 10, 2002, Defendants filed a motion to dismiss. On February 25, 2002, the court entered a Memorandum and Order in which provided:

Based on the foregoing, IT IS HEREBY ORDERED as follows:
(1) Defendants' motion is dismiss on statute of limitations grounds is GRANTED with prejudice as to Synclair's false arrest claim found in the third claim for relief and which concerns events which occurred between July 16, 1999 and July 13, 2000;
(2) Defendants' motion is dismiss on statute of limitations grounds is DENIED as to Synclair's first and second causes of actions;
(3) Defendants' motion to dismiss based on prosecutorial immunity is GRANTED with prejudice only to the extent, if any, that Synclair bases any claim on activities by

Defendants in investigating, charging, and prosecuting Synclair for child abduction;
(5) Defendants motion to dismiss is GRANTED with leave as Synclair's claim under the Fourth Amendment;
(6) Defendants' motion to dismiss is GRANTED with prejudice as to Synclair Claim under the Fifth Amendment;
(7) Defendants' motion to dismiss is GRANTED with prejudice as to Synclair's equal protection claim under the Fourteenth Amendment;
(8) Defendants' motion to dismiss is DENIED as to Synclair's procedural due process claim under the Fourteenth Amendment;
(9)Defendants' motion to dismiss is GRANTED with leave to amend as to Synclair's substantive due process claim;
(10) Defendants' motion to dismiss based on abstention is DENIED;
(11) Synclair is granted twenty (20) days from the date of service of this order to file and serve a first amended complaint in compliance with this order.

Plaintiff filed a first amended complaint on March 13, 2002. Plaintiff names as Defendants County of Fresno, Department of Child Abduction Unit, and individuals William Frank, Ron Hopper, Dennis Lewis, and Edward Hunt.

On April 4, 2002, Defendants filed a motion to dismiss Plaintiff's first amended complaint on the grounds of absolute immunity, qualified immunity, and lack of governmental entity liability. On May 21, 2002, the court entered a memorandum opinion and order denying

Defendants' motion. Defendants filed an answer on May 31, 2002.

On May 16, 2003, Defendants filed the motion for summary judgment now pending before this court, originally setting motion to be heard on June 16, 2003. On June 9, 2003 the court entered an order vacating the hearing and requiring Plaintiff to comply with the Local Rules by filing a response to Defendants' statements of undisputed facts. Further, the court struck Plaintiff's statement of undisputed material facts as unauthorized under Local Rules.

On June 20, 2003, Plaintiff filed a document entitled, "Plaintiff's Statement of Disputed Facts in Re Motion for Summary Judgment." Despite this title, the document contains Plaintiff's response to Defendants' statement of undisputed facts. Accordingly, the court will treat it as such.

The court has reviewed the papers and has determined that this matter is suitable for decision without oral argument. Local Rule 78-230(h). Therefore, the court will not reschedule a hearing on this matter and has taken the matter under submission on the papers.

Undisputed Facts

1. On June 4 ,1994, Plaintiff and Svetlana Synclair were married in Russia. On May 14, 1995, son Larry Jr. was born in Fresno, California. After returning to Russia not long after the child's birth, the parties separated in 1998. With Larry Jr. staying with his mother. That same year, Plaintiff

filed for divorce in the Dorogomilovo District Court of Moscow. After that, he fled Russia with his son, and began dissolution proceedings in Fresno in February 1999. Declaration of Dennis Lewis ¶ 15.

2. On March 10, 1999, the head of the District Management Office for the Dorogomilovo District Court of Moscow recommended to the court that Svetlana Synclair be given permanent custody of Larry Jr., based on the best interest of the child. Declaration of Dennis Lewis ¶ 15.

In response to this stated fact, Plaintiff states, "[d]eny. No official certification of or verification by Russian Court. See defendants' #6 answer to undisputed facts." Plaintiff thus apparently both denies the stated fact and raises an evidentiary objection. As set forth above, in order to establish the existence of a factual dispute, party opposing a motion for summary judgment may not rely upon the mere allegation or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); see Local Rule 56-20(b) ("Any party opposing a motion for summary judgment or summary adjudication shall reproduce the itemized facts in the Statement of Undisputed Facts and admit those facts which are undisputed and deny those which as disputed, including with each denial a citation to the particular portions of any pleadings, affidavit, deposition, interrogatory answer, admission or other document relied upon in support of that denial.") In regard to the present stated fact, Plaintiff has tendered no evidence in support of his denial. The court finds, therefore,

that Plaintiff has not demonstrated the existence of a genuine dispute as to this fact.

In regard to his apparent evidentiary objection, Plaintiff provides no citation to legal authority or even any reference to a legal principle. Rather Plaintiff simply states, "No official certification of or verification by Russian Court. See defendants #6 answer to undisputed facts." Such an unsupported objection in insufficient to require the exclusion of proffered evidence. Further, assuming that Plaintiff is objecting to the admission of evidence of the contents of the Russian court's order, Rule 1002, Federal Rules of Evidence, does require the use of the original to prove the contents of the writing. However, Rule 1004 provides for the admissibility of other evidence of the contents of a writing where the original is unattainable. Here, as Plaintiff himself points out, it is undisputed that effort by Defendants to obtain a certified copy of the order through the U.S. State Department and Embassy in Russia have been successful. Accordingly, the court finds the Declaration of Dennis Lewis admissible to prove the contents of the writing in question.

3. On March 22, 1990, the head of the Social Development Dept. prepared a home study for the court on the mother and child's living conditions. Declaration of Dennis Lewis, ¶ 15.

In response to this stated fact, Plaintiff states, "[d]eny. No official certification of or verification by Russian Court. See defendants' #6 answer to undisputed facts."

For reasons stated in regard to fact no. 2, the court

finds that Plaintiff has not demonstrated the existence of a genuine issue as to this fact, and Plaintiff's evidentiary objection is overruled.

4. On July 20, 1999, the Dorogomilovo District Court issued noticed to Plaintiff of a child custody hearing scheduled for August 4 ,1999. If he didn't appear, custody would be decided without him. Request for Judicial Notice, ¶ 2.

For the reasons stated in regard to fact no. 2, the court finds the Plaintiff has not demonstrated the existence of a genuine issue as to this fact, and Plaintiff's evidentiary objection is overruled.

5. On February 9, 2000, with both sides and their attorneys present, the Dorogomilovo District Court ruled on custody, visitation, and child support. In the best interest of the child, the court granted permanent custody to Larry Jr. To Svetlana, and visitation to Plaintiff. The court also considered the financial condition of the parties and ordered Plaintiff to pay child support in the a month of $375 per month. Declaration of Dennis Lewis, ¶ 18.

Plaintiff denies this fact, citing to page 45 of his own deposition, at which he states, "there was never any arrangement in Russia concerning custody and visitation of Larry Jr." Plaintiff, however, has neither lodged a [sic] the original of his deposition with this court, nor provided an excerpt of the relevant portions as an exhibit to his opposition. Pursuant to Local Rule 56-260, "[t]he opposing party shall be responsible for the filing with the Court of all evidentiary documents cited in the opposing papers." More specifically , Local Rule 5-134(e) provides. "[p]rior to or

upon the filing of a document making reference to a deposition, it shall be the duty of the attorney relying on the deposition to ensure that the original of the deposition to ensure that the original of the deposition so relied upon has been filed or lodged with the Clerk. See Fed.R.Civ.P. 30(f)."

The exhibit provided by Defendants in support of the stated fact is a copy of a document filed in Fresno County Superior Court on July 25, 2000, entitled, "Filing of Foreign Court Order." The court order in question meets the description set forth by Defendants. The court concludes, therefore, that Plaintiff has failed to establish the existence of a genuine issue as to this stated fact.

6. Efforts by the Defendants to obtain a certified copy of the order through the U.S. State Department and Embassy in Russia have been unsuccessful. Declaration of Dennis Lewis, ¶ 19.

7. Also unsuccessful has been an attempt to discuss the case with Plaintiff's attorney in Russia. Declaration of William Frank, ¶ 7.

8. On April 3, 2000, Bradford Johnson, Chief of American Citizen Services, United States Embassy, Moscow, sent a diplomatic note (CON 2000-017) to the Russian Ministry of Foreign Affairs in reference to "a Russian court decision granting full custody of Larry to his mother, Mrs. Svetlana Victorovna Synclair, in the absence of a finalized divorce decree." The note requested assistance in arranging a visit between Larry Jr. And embassy staff. Declaration of Dennis Lewis, ¶ 17.

9. After fleeing with his son from Russia, on February 8,

1999, Plaintiff filed a Petition for Legal Separation in the Fresno County Superior Court, case number 626188-7. Request for Judicial Notice, ¶ 1.

10. On April 6, 1999, at a hearing on a motion to dismiss for lack of jurisdiction brought by Svetlana's attorney, Mr. John Johnson, the court ruled that Russia was the home state of Plaintiff's son. Declaration of Dennis Lewis ¶ 8.

11. During the proceedings, Fresno County Superior Judge Jane Cardoza found that under than Family Code section 3403 (Uniform Child Custody Jurisdiction Act), "California is not the home state of this child since the child resided in the country of Russia for most of his life and has only until recently been brought to the United States." Judge Cardoza also ruled that, "based on the fact that the child has resided in Russia for the majority of its life,...[it] appears to the court that it would be in the child's best interests that the Russian court have jurisdiction and consider the evidence that's before that court concerning the child." She further ruled that the child had not been mistreated, abused, or neglected by his mother. Judge Cardoza concluded by granting the mother motion to dismiss. "Accordingly, the court will grant the motion to dismiss this action finding that it is the coutry of Russia, specifically Moscow, that would have jurisdiction in this matter." Declaration of Dennis Lewis ¶¶ 9-12.

12. Plaintiff's appeal of this decision to the California Fifth District Court of Appeal was denied. Declaration of Dennis Lewis ¶ 14.

13. On July 17, 1999, Judge Cardoza explained his ruling in her answer to Plaintiff's Motion to disqualify her from

further hearing the case. She stated that "[o]n April 6, 1999, after reading and considering the pleadings submitted by the parties and after hearing argument by counsel, I made certain orders and findings...I recall relying primarily on Family Code section 3403. Pursuant to that section, I ruled that the State of California does not have subject matter jurisdiction and that Larry Jr.'s home state is Russia. I ordered petitioner to deliver the minor child to respondent and Comprehensive Youth Services by five o' clock p.m. that same day. Declaration of Dennis Lewis ¶ 13.

14. On September 2, 1999, despite her previous decision and evidence of the Russian divorce and child custody proceedings attached to pleadings, Judge Cardoza adopted the recommendations of the Fresno County Family Court Mediator Yoshi Asanuma, granting the mother primary custody of Larry Jr., and visitation to Plaintiff. Declaration of Dennis Lewis ¶ 16.

15. Around July 2000, Plaintiff requested that criminal charges be brought against Svetlana for violating visitation orders. Alleging that he had been denied court ordered visitation, Plaintiff requested the Child Abduction Unit file criminal charges against Svetlana. Plaintiff's request was denied because of a lack of proof and procedural problems. Declaration of William Frank ¶ 6.

In response, Plaintiff states that he admits this stated fact as to his request for criminal charges, but denies it as to the reason no charges were filed. Plaintiff, however, provides no reference to any evidence supporting his denial. Pursuant to Local Rule 56-260(b), any party opposing a motion for summary judgment must reproduce the itemized

facts in the statement of undisputed facts filed by the moving party for each stated fact that is denied provide "a citation to the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission or other document relied upon in support o [sic] that denial." Further, the court finds that the citation provided by the Defendants in support of the stated fact is to a copy of a letter dated July 21, 2000, from Deputy District Attorney William R. Frank to Attorney Jerry Shapiro, counsel to Plaintiff. In this letter, Frank expressly states that, "because of the jurisdictional questions and insufficiency of the evidence, this office will not criminally prosecute Svetlana Synclair, nor will we proceed with civil contempt." The court finds that this evidence does support that stated fact and that Plaintiff has failed to demonstrate the existence of a genuine issue as to the fact.

16. On April 13, 2001, in response to a letter from Plaintiff, Defendant Dennis Lewis wrote that the only proper action was to ask the Fresno County Superior Court vacate all orders in the case subsequent to the finding that Russia was the home state of Plaintiff's son. Declaration of Dennis Lewis ¶ 7.

In response, Plaintiff states, "[a]dmit the contents of the letter deny that was the only proper action to ask the court to vacate all orders in the case/Proper action would have been to take steps to assist Federal authorities and to carry visitation. The court finds that Plaintiff has failed to establish the existence of a genuine issue as to this fact.

17. Since the beginning of 2002, venue for this case has been in San Diego County.

18. Both Defendants Dennis Lewis and William Frank, as deputy district attorneys assigned to the Child Abduction Unit, report sent the court pursuant to California Family Code 31332 ("In [locating missing parties or children, or helping enforce orders], the district attorney shall act on behalf of the court and shall not represent any party to the custody proceedings," and Fresno County Superior Court Local Rule 35.1 ("The District Attorney does not represent either party in a custody/visitation dispute...The District Attorney of Fresno County...Acts on behalf of the court in enforcement of specific child custody and child visitation orders.") Declarations of Dennis Lewis and William Frank, ¶ 3.

19. Defendant Edward hunt was not involved in the decision of the Child Abdu8ction United [sic] reflected in the letter dated April 13, 2001, by Defendant Dennis Lewis. Declaration of William F. Mar, Jr., ¶ 3.

Plaintiff denies this fact, stating "defendant Hunt's name appears on the letter. He is the District Attorney responsible for the action of his office." The evidence cited to by Defendants in support of the stated fact refers to the Deposition of Edward Hunt. At page 9 of his deposition, when asked whether he was involved in the decision that led Mr. Lewis to write he letter of April 13, Mr. Hunt responds, "I was not." The court finds that Plaintiff's argument does not address the precise stated fact, and that has not been established the existence of a genuine issue as to that fact.

20. While the events were taking place, he was not involved in any discussions concerning the case. The policy

of the District Attorney office would be for a deputy to have the court vacate, modify or clarify an order that was thought to be invalid. Declaration of William F. Mar., Jr. ¶ 3.

21. Defendant Ron Hopper was not actively involved in Plaintiff Fresno child custody case. The decision of the Child Abduction Unit reflected in Defendant Dennis Lewis' letter dated April 13, 2001, was made by attorneys. He only acted as a messenger for communications between Plaintiff and the Child Abduction Unit attorneys. Declaration of William F. Mar, Jr. ¶ 4.

In response, Plaintiff states simply, "[d]eny, tendering no evidence in support of his denial. For the reasons stated in regard to fact number 1, the court finds that Plaintiff has not demonstrated the existence of a genuine dispute as to this fact.

Discussion

Federal courts are courts of limited jurisdiction: they can adjudicate only those cases which the Constitution and federal status authorize them to adjudicate. See Kokkonen v. Guardian Life Ins Co. of America 511 U.S. 375, 377 (1994) Because of this limited jurisdiction, federal courts are presumptively without jurisdiction over civil action and the burden of establishing the contrary rests upon the party asserting jurisdiction. Id. Lack of subject matter jurisdiction is never waived and may be raised by either party or the court at any time. See Attorneys Trust v. Videotape Computer Products, Inc. 93 F.3d 595, 594-95 (9th Cir.

1996); In re Mooney, 841 F.2d 1003, 1006 (9th Circ. 1988).

The court finds that in light of the undisputed facts in this case, it is called upon to examine its subject matter jurisdiction. Under the Rooker-Feldman doctrine, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." Johnson v. Grandy, 512 U.S. 997, 1005006 (9th Cir. 1994); see Rooker v. Fidelity Co., 263 U.S. 413, 415-16 (1923).

The Ninth Circuit explained as follows in Worldwide Church of God, 805 F.2d 888, 890-92 (9th Cir. 1986):

> As a preliminary matter, we must address the federal court's jurisdiction. See Solano v. Beilby, 761 F.2d 1369 (9th Cir. 1985) (the court of appeals must raise jurisdictional issues sua sponte). The United States District Court, as a court of original jurisdiction, has no authority to review the final determination of a state court in judicial proceedings. 28 U.S.C. § 1257 provides that the proper court in which to obtain review is the United States Supreme Court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 Sct. 1303, 1311, 75 L.Ed.2d 206 (1983). See Atlantic Coast Line R. Co. v. Locomotive

Engineers, 398 U.S. 281, 296, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970) (lower federal courts may not sit in review of state courts' decisions); Rooker v. Fidelity Trust Co. 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923) (district courts may not exercise appellate jurisdiction over state courts); Robinson v. Ariyoshi 753 F.2d 1468, 1471-72 (9th Cir. 1985) (federal court has no jurisdiction over federal constitutional issues if consideration would require a review of the allegation underlying the state judicial decision), vacated on other grounds, ---U.S. ----, 106 S.Ct. 3269, 91 L.Ed.2d 560 (1986); Texaco v. Pennzoil Co., 784 F. 2d 1133, 1141042 (2d Cir.) (inferior federal courts may not act as appellate tribunals over state courts) prob. Juris. Noted, ---U.S. ----, 106 S.Ct. 3270, 91 L.Ed.2d 561 (1986).

This doctrine applies even when the challenge to the state court decision involves federal constitutional issues. Feldman, 460 U.S. at 484-86. 103 S.Ct. at 1316 (quoting Doe v. Pringle, 550 F.2d 596, 599 (10th Cir. 1976), cert. Denied, 431 U.S. 916, 97 S.Ct. 2179, 53 L.Ed.2d 227 (1977), for the proposition that "[t]his rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protected rights");

Robinson, 753 F.2d at 1472. The rationale for this rule is that state courts are as competent as federal courts to decide federal constitutional issues. Allen v. McCurry, 449 U.S. 90, 105, 101 S.Ct. 411, 420, 66 L.Ed.2d 308 (1980) (stating that nothing in legislative history to § 1983 supports the argument that a person claiming a federal right should have an unrestricted opportunity to relitigate in federal court issues already decided in state court; state courts have an obligation and the ability to uphold federal law); Huffman v Pursue, Ltd., 420 U.S. 592, 611, 95 S.Ct. 1200, 1211, 43 L.Ed.2d 482 (1975) (rejecting the argument that "state judges will not be faithful to their constitutional responsibilities"). In addition, any other rule would result in a waster of judicial resources and unnecessary friction between state and federal courts. See Atlantic Coastline, 398 U.S. at 286, 90 S.Ct. at 1742; Pennzoil, 784 F.2d at 1142.

Although the federal court may not exercise appellate jurisdiction over the judgment of a state court, a district court does have jurisdiction over a "general" constitutional challenge that does not require review of a final state court decision in a particular case. See Feldman, 460 U.S. at 482-86 & n. 16, 103 S.Ct. at 1314-17 & n. 16; Tofano v. Supreme Court of Nevada, 718 F.2d

313, 314 (9th Cir. 1983). This distinction between a permissible general constitutional challenge and an impermissible appeal of a state court determination may be subtle, and difficult to make. See Feldman, 460 U.S. at 485, 103 S.Ct. 1316 (quoting Doe v. Pringle, 550 F.2d at 597); Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1433 (10th Cir. 1984), cert. denied, 471 U.S. 1016, 105 S.Ct. 2019, 85 L.Ed.2d 301 (1985).

In Feldman, 460 U.S. at 486, 103 S.Ct. at 1316, the District of Columbia Court of Appeals had refused to admit Feldman to the District of Columbia bar, because he had not graduated from law school, a prerequisite to admission under the District's bar rules. Feldman filed a complaint in federal district court, claiming that the highest court in the district's refusal to admit him to the bar violated his constitutional rights.

The United States Supreme Court held that the federal district court had jurisdiction to determine the constitutionality of the district's bar rule, because such a determination did not require a review of "a state-court judgment in a particular case." Id. [FN1] However, the district court has no jurisdiction to review Feldman's constitutional challenge to the application of the bar rule in his particular case. See

Feldman, 460 U.S. at 486-87, 103 S.Ct. at 1316-17. [FN2] The Supreme Court further explained that "[I]f the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to a the state bar, then the district court is in essence being called upon to review the state court decision." Id. at 483-84 n. 16, 103 S.Ct. at 1315 n. 16.

FN1. The courts of the District of Columbia, for this analysis, are the equivalent of state courts.

FN2. The Supreme Court held that subject matter jurisdiction existed to consider claims that the rule created an irrefutable presumption that only law school graduates are competent to practice law; that the rule discriminated a against persons with equivalent legal training; and that it impermissibly delegated judicial power to the American Bar Association. The Court did not reach the issue of whether the doctrine of res judicata foreclosed litigation on these claims, leaving the determination to the district court. Feldman, 460 U.S. at 487, 490, 103 S.Ct. at 1317-18. The Court concluded that subject

matter did not exist over claims that the District of Columbia Court of Appeals acted arbitrarily and capriciously in refusing to waive the bar rule in Feldman's case even though it had waived the rule in other cases. Id. at 486-87. 103 S.Ct. at 1316-17.

As the Tenth Circuit noted in Razatos, 746 F.2d at 1433, Feldman's language does not provide a "bright line" to rule to distinguish claims that are inextricably intertwined with a state court's decision from those that are not. The Razatos court concluded that claims are "inextricably intertwined" if the district court must "scrutinize not only the challenged rule itself, but the [state court's] application of the rule..." If, in order to resolve the claim, the district court would have to go beyond mere review of the state rule as promulgated, to an examination of the rule as applied by the state court to the particular factual circumstances of [plaintiff's] case," then the court lacks jurisdiction. See also Brown v. Board of Bar Examiners 623 F.2d 605, 610 (9th Cir. 1980) (because the Plaintiff's complaint and requested relief involved an application of the challenged rule to his particular case, and would require a review of the state court decision, the court concluded that it lacked

jurisdiction); Czura v. Supreme Court of South Carolina, 632 F.Supp. 267, 270 (D.S.C. 1986) (same).

Robinson, 753 F.2d at 1472, contains this court's only detailed discussion off Feldman's language. In that case, the issue was whether federal constitutional issues that the state court had refused to consider on a petition for rehearing should be deemed "inextricably intertwined" with the state court's judgment:

> Faced with the task of deciding our power to review constitutional issues which arise from a state court proceeding, we review the res judicata requirement of full and fair opportunity to litigate, and the Feldman "inextricably intertwined" barrier as two sides of the same coin. Under the rubric of either "jurisdiction" or "res judicata," the crux of the question is whether there has been actual consideration of and a decision on the issue presented. If consideration and decision have been accomplished, action in federal court is an impermissible appeal from the state court decision. If no consideration has been given, or any decision on the matter is ambiguous, it is unlikely that the issues presented to the state high court and to the federal court are so

> "inextricably intertwined" that the federal court cannot take jurisdiction. (citations omitted).

In his first amended complaint filed March 13, 2002, Plaintiff describes the nature of this action as follows:

> This is a 42 U.S.C. [section] 1983 action brought by the plaintiff who was subjected to constitutional due process and substantive due process violations by defendants acting under color of law for administrative no prosecutorial conduct, in failing to obey a November 3, 2000 Order of the Superior Court of the County of Fresno, wherein defendants were ordered to cooperate with federal authorities to ascertain the whereabouts of plaintiff's son, Larry Jr., who was born in the United States of America, but was ordered into custody and taken to Russia. The domestic custody order is not challenged in this action.

Thus, Plaintiff seeks to challenge Defendants' actions in allegedly failing to obey the Fresno County Superior Court Order of November 3, 2000, which provides as follows:

> 1. Fresno county [sic] has jurisdiction over subject matter of this proceeding as there has not been confirmation from the Russian

Federation stating otherwise, nor has there been filed a certified copy of a court order from the Russian Federation indication otherwise.

2. Petitioner, Larry Synclair, shall have a minimum of four weeks visitation with the minor child of the parties, Larry Synclair, Jr., which shall include the Christmas Holidays, as permitted by flight schedules. Respondent shall be responsible for the costs of the round trip air fare, however, Petitioner is purchase the tickets that can be used at any time, to be available when the minor child of the parties, Larry Synclair, Jr. has been located. Respondent is to reimburse Petitioner within 30 days of the receipt of the tickets.

3. The Court further grants Petitioner's oral motion for an Order Shortening Time for notice of motion directed to the District Attorney of Fresno County to release the address of Respondent, pursuant to Family Code Section 17512. The motion is scheduled to be heard on December 6, 2000, in Department 33 of the above entitled Court, at 9:00 A.M. This Order After Hearing shall be deemed notice of that hearing and shall be served upon the Respondent by the Office of the District Attorney of Fresno County, Child Abduction Unit.

4. The District Attorney of Fresno County,

> Child Abduction Unit, shall take all steps necessary to assist various government agencies, both in the United States and in the Russian Federation, to carry out compliance with this order.

Following the court's order, Plaintiff received from Deputy Fresno County District Attorney Dennis L. Lewis a letter dated April 13, 2001, which explains Defendants' actions as follows:

> Dear Mr. Synclair:
>
> Your letter of April 9, 2001 has been forwarded to my attention. I have reviewed the pertinent pleadings, investigation reports and correspondence in our files. As a result of my review, I believe that the only proper action for this office would be to ask the Fresno County Superior Court to vacate all orders subsequent to finding that Russia is the home state of Larry Synclair, Jr.[1]
>
> As you know, any order issued absent proper jurisdiction is void *ab initio.* Simply put, this office cannot enforce an invalid order. Further, we cannot make any demands

---

[1] As set forth in undisputed fact 10, the court made that finding on April 6, 1999.

> upon the Russian executive or judicial system to enforce these invalid orders.
>
> I presume your attorney, Mr. Shapiro, discussed with you the issues associated with the fact that Russian is a non-Hague Convention nation. I know that many parents are frustrated by the fact that they must litigate custody in the Russian judicial system. The matter is further complicated by the fact that federal law prohibits our consular and diplomatic officers from performing even the smallest legal services. However, these facts do not alter the reality that nothing further can be done in Fresno County.

In the present case, Defendants move for summary judgment on the grounds of qualified immunity, lack of individual capacity liability, lack of official capacity, and lack of municipal liability. The court finds that in order to rule on the merits of the case, this court must decide on the constitutionality of the decision of the District Attorney's office outlined in the letter of April 13, 2001. The court further finds, after reviewing the papers on the pending motion, that the issue of constitutionality of the District Attorney's office decision is "inextricably intertwined" with the validity of the orders of the Fresno County Superior Court entered April 6, 1999, and November 3, 2000. That is, to rule on the first issue, the court must also rule on the second. The court concludes that such as ruling would, under the authorities outlined above, constitute an

impermissible exercise of appellate jurisdiction over the judgment of a state court. See Worldwide Church of God, 805 F.2d at 890-92. Thus the court finds that under the Rooker-Feldman doctrine, it lacks subject matter jurisdiction over this case. Accordingly, this entire case must be dismissed with prejudice.

ORDER

In light of the foregoing, IT IS HEREBY ORDERED that this entire action is DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction and Defendants' motion from summary judgment is DENIED as moot.

DATED: 7-29-03

/s/
ANTHONY W. ISHII
UNITED STATES DISTRICT JUDGE

Original Filed June 20 2003
Clerk, US District Court
Eastern District of California
By Deputy Clerk

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United States District Court,
Eastern District of California

LARRY SYNCLAIR, SR. Plaintiffs,
Vs.
COUNTY OF FRESNO, et al. Defendants.

CASE NO. CIV F-01-6546 AWI DLB

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS IN RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Now come plaintiff Larry Synclair, Sr., by and through his attorneys Schneider & Schneider, P.C. and in response to defendants' motion states as follows plaintiff's statement of undisputed facts taken from defendants' deposition

testimony:

UNDISPUTED FACTS

1. That defendants Frank, Lewis, and Hopper each had knowledge of November 3, 2000 Court Order from Superior Court of Fresno County.

2. That all defendants had a legal duty to enforce, clarify, or appeal Orders of Superior Court of Fresno county.

3. That there was a policy of defendant Child Abduction Unit to enforce, clarify, or appeal orders of Superior Court Order.

4. That no Action was taken by any defendant herein to enforce, clarify or appeal the November 3, 2000 Superior Court Order, based upon defendants determination that the Fresno Superior Court had no jurisdiction to enter said order.

5. That on July 30, 2002 the San Diego County affirmed the previous order of jurisdictional authority by Fresno County and exercised jurisdiction in said custody order over said matter

SUPPORTING EVIDENCE

1.Defendant Frank's knowledge of the 200 Court Order is on page 12 of his deposition. Exhibit A. Also see Frank's

transcript of November 2, 2000 and the November 3, 2000. (See Plaintiff's Exhibits in Support of Response To Defendants Motion to Dismiss #3 and #2)

2. See defendant Hunt's undisputed fact listed in #20, that the policy of the District Attorney's Office would be for a deputy to have the court vacate, modify, or clarify an order that was thought to be invalid. See deposition testimony of Edward Hunt pages 11 & 12. See Exhibit B

3. See above.

4. See Plaintiff's Exhibits in Support of Response to Defendants' Motion For Summary Judgment #4, defendant Lewis' letter of April 13, 2001. See defendants' statement of uncontested facts #1-21 that fails to mention any action taken to pursuant to Court Order of Nov. 3, 2000 which failed to make reference to any action to vacate, modify or appeal the Nov. 3, 2000 Court Order. See pages 82, 83, 84, 85, of defendant Frank's deposition. Exhibit C

5. See Plaintiff's Exhibits in Support of Response to Defendants' Motion For Summary Judgment #6.

Dated, 6/19/03

Respectfully Submitted,
/s/
Keith J. Schneider
Attorney for Plaintiff Synclair

PROOF OF SERVICE

SYNCLAIR, SR., VS COUNTY OF FRESNO, ET AL
U.S. District Court Case No. CIV F-01-6546 AWI DLB

I, MYRA SCHNEIDER, declares as follows:

I am a resident of the State of Illinois, over the age of eighteen years, and not a party to within action.

On June 19, 2003, I served a copy(ies) of the within

PLAINTIFF'S STATEMENT OF DISPUTED FACTS IN RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH EXHIBITS

on the interested party(ies) in said action addressed as follows:

Phillip S. Cronin, Esq. County Counsel
William F. Mar, Jr., Esq. Senior Deputy
2220 Tulare Street, 5th Floor,
Fresno, CA 93721

by placing the document(s) listed above for mailing, in accordance with counsels address for collection and processing of mail, and addressed as set forth above and by fax.

I delclare under penalty of perjury under the laws of the

State that the foregoing is true and correct. Executed on June 19, 2003

/s/
MYRA SCHNEIDER

FILED
Clerk of the Superior Court
DEC 20 2002
By: Pam Fiscus

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

Larry Synclair,
Petitioner

v.

Svetlana Synclair,
Respondent.

Case No.: DN122638
Order After Hearing

This matter came on for hearing on April 24, 2002 and again on June 19, 2002 in Department 15 of the North County Division of the Superior Court, in and for the County of San Diego, the Honorable Jeffrey Barton, Judge presiding. On July 30, 2002, the court issued an order staying the action and setting a review hearing for November 20, 2002. The matter came on regularly for hearing on November 20, 2002. As before, the matter before the court was Petitioner's Order to Show case re

Custody Modification. Petitioner Larry Synclair was present and self-represented. There was no appearance by Respondent.

The court took the matter under submission. The court now renders its ruling.

Issue Presented

The issue presented in this case is whether a California court has jurisdiction to grant father's request for custody and visitation orders where the child resides with Mother in Russia, and where a Russia court allegedly issued custody and visitation orders. The court finds that, on the facts presented as they now stand, it does have jurisdiction to issue custody and visitation orders in this action.

Jurisdiction

As indicated in this court's previous order, the jurisdictional requirements of the Uniform Child Custody Jurisdictional and Enforcement Act (UCCCJEA) must be satisfied before the court makes any custody determinations. (Family Code § 3421, subds. (a), (b)).

The UCCJEA aims to ensure that only one state will have jurisdiction to adjudicate child custody at any point and that a jurisdictionally sound custody order will be recognized and across state and national lines. (Hogoboom & King, Cal. Practice Guide: Family Law, supra, P 7:80.3, pp.7-27 - 7-28). As one writer described it, the purpose of the Act is to formalize a type of jurisdictional etiquette so as to minimize interstate conflict over custody

determinations (Bodenheimer, The Uniform Child Custody Jurisdictional Act: A Legislative Remedy for Children Caught in the Conflict of Laws) (1969) 22 Vand.L.Rev. 1207, 1232.)

As the court noted in its previous order, it is clear that at some point there were custody proceedings in the Dorogomilovsky InterMunicipal District Court in Moscow, Russia.

Family Code § 3426(c) provides that if a court determines that a child custody proceeding has been commenced in a court in another state - including foreign country - having jurisdiction substantially in conformance with the UCCJEA, the court of this state shall stay its proceedings and communicate with the court of the other state.

The court stayed the action on July 30, 2002 so that it could communicate with the Moscow court, as required under UCCJEA.

To that end, the court drafted a letter to the Moscow court, requesting that the Moscow court advise this court whether it had issued any custody and visitation orders, and requesting that the court provide a certified copy of any such orders. The court also inquired whether the orders had been appealed, and requested the status of any such appeal. The court also asked whether the Moscow court would prefer to maintain jurisdiction over the matter.

The letter was translated into Russian by a certified translator, Ms. Raia Rechaim, and was then sent to the

Moscow court by mail.[2] It was also served on Respondent, the American Embassy in Moscow, the District Attorney for the County of San Diego, former counsel for Respondent and Petitioner.

The court received no response from the Moscow court. The court did receive a package with a Moscow return address, but the package did not originate with the Moscow court. The zip and postal code on this return address (119334) does not match that of the Moscow court (121165), or any of the parties to whom the court's letter was mailed.

This package was originally addressed to Mr. Synclair, but was then forwarded to the court's physical address at 325 S. Melrose Dr., Vista, CA 92083. A note from the shipper, DHL, inserted into a window of the package, requests that the package be delivered to the court reporter for this department.[3] The package was duly delivered to the court reporter on October 24, 2002. The court reporter gave the package to he clerk and the clerk provided the package to the judge. Copies of the documents were given to Mr. Synclair at the November 20, 2002 hearing.

In the package were 2 documents written in Russian and a certified translation of each. The first document is a Petition for Dissolution addressed to the Moscow court and

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[2] The address of the Moscow court was correct as evidenced by a Petition filed in that court by Mrs. Synclair.

[3] In practice communications between courts under the UCCJEA are made judge to a judge.

signed by Mrs. Synclair on July 29, 2002.

The second part of the communication is a Notice, advising Mr. Synclair that a hearing will be held in the suit filed by Svetlana Viktorovna Synclair against Larry Ross Synclair with respect to the marital dissolu8tion action. The date of the hearing, to take place in Moscow, is February 17, 2003.

Ms. Synclair's Russian dissolution petition states that Moscow court has already made a decision on custody and support on Larry Jr. This is unsupported by any court order or other evidence.

The statement in Ms. Synclair's Russian dissolution does not establish to the satisfaction of the court that the Moscow order has, in fact, made a custody, support and visitation order, and that such order remains in effect. Court cannot take judicial notice of the truth of facts asserted in documents that are in court files. *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914. The best evidence of such as order is, of course, the order itself, or a certified copy thereof. Ms. Synclair attorney was present when Judge Cardoza of the Fresno County Superior Court requested a certified copy of the Russian order. The court declined to release jurisdiction until that was done. The order was never produced.

There is no information before the court to indicate whether any such order was permanent or temporary. It is unclear if the order provides a visitation schedule. In short, the terms of any such order remain a mystery. The court cannot determine whether such order, if it exists, is in substantial conformity with the UCCJEA.

With that in mind, the court now turns to the

question of its jurisdiction to issue custody/visitation order in this matter.

Jurisdiction

As noted in the court's previous order, the UCCJEA sets forth four tests for determining whether a California court has jurisdiction over a child custody dispute. Family Code § 3421. Briefly summarized, these tests are as followed: 1) The home state test, 2) The "significant connection and substantial evidence" test, 3) Where another state having jurisdiction has declined to exercise it in favor of California as a "more appropriate forum", and "Default" jurisdiction, where no other court of any state (or foreign country) would have jurisdiction under the first three tests (See, generally, Hogoboom & king, §7:789-7:108).

The court's tentative opinion in this matter, was that it lacked jurisdiction under any of the four tests based on the information before it at that time. [July 30, 2002 Order[4]]. The court also found that it lacked jurisdiction under the temporary emergency jurisdiction of Family Code § 3424. The court will not revisit its determination that it lacks temporary emergency jurisdiction in this matter.[5] Nor

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[4] The facts and procedural background of this case are set forth in the July 30, 2002 order, which is hereby incorporated as if fully set forth herein.

[5] This determination is in accord with that of Judge Cardoza of the Superior Court in and for the County of San Diego who stated: [T]he court could take jurisdiction if in a situation where it's an emergency...the court has again read the declarations of the parties and

will it revisit its determination that it lacks jurisdiction under Family Code § 3421(a) subdivision (1) or (2). The court clearly lacks jurisdiction either under the "home state" test or the "significant connection" test, for the reason set forth in the court's previous order.

However, for reasons set forth below, the court finds that it has jurisdiction to make and enforce child custody and visitation orders in this matter under Family Code § 3421(a)(3) (foreign state declines to exercise jurisdiction) and/or Family Code § 3421(a)(4) (default jurisdiction).

Jurisdiction under Family Code §3421(a)(3)

Under the UCCJEA, a court of this state has subject matter jurisdiction if a court with home state jurisdiction, or a court in a state to which the parties have a significant connection, declines to exercise its jurisdiction on the ground that California is the more appropriate forum. (Family Code §3421(a)(3)).

The court initiated communication with the Moscow court, as required by Family Code § 3426, for the purpose of coordinating any proceedings affecting Larry Jr., and to avoid any possibility of jurisdictional conflict.

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does not find that the child has been mistreated or abused or neglected". [Hrg April 6, 1999, RT 16].

However, as noted above, the Moscow court did not respond. Neither has there been any response from respondent on the subject of any custody or visitation order pertaining to Larry Jr.. As noted, Respondent failed to provide a certified copy of the order as requested by the Fresno County Superior Court. As a result, the court is faced with a circumstance where there are existing custody and visitation orders from the Fresno County Superior Court. The court has given both the respondent and the Russian court the opportunity to assert that jurisdiction lies in Russia. Neither Respondent nor the Russian Court has done so.

The court can only conclude from this information that the home state has ceded jurisdiction to this court as the more appropriate forum, thus conferring jurisdiction on this court under Family Code § 3421(a)(3). Under ideal circumstances, the court of the home state would affirmatively declare whether it wishes to retain jurisdiction or to defer jurisdiction to another court on grounds that the second court is a more appropriate forum. Communications between courts in foreign nations are complicated by language problems, time differences, cultural differences, and distance. The court attempted to surmount these problems by writing to the Moscow court in Russian, and by allowing ample time for a reply. During this time period, Respondent could have facilitated communication between the courts by procuring a certified copy of any relevant Russian orders and providing them to the court, with a declaration explaining their significance. The only communication the court received was a Petition for

Dissolution of Marriage. The provenance of this communication is uncertain.

Under these circumstances, the court has no choice but to conclude that the silence of both the Respondent and the Moscow court are a concession that this court is the more appropriate forum for the adjudication of the custody and visitation issues with respect to Larry, Jr.. There is no evidence before this Court that the Russian Court is asserting jurisdiction and has issued orders governing the child's best interests.

Jurisdiction under Family Code § 3421(a)(4)

Alternatively, the court finds that it may exercise jurisdiction under Family Code § 3421(a)(4). The UCCJEA contemplates that there will always be one appropriate forum for the exercise of jurisdiction. (See, *Marriage of Fox* (1986) 180 Cal.App.3d 862). It thus provides for "default" jurisdiction where no other state would have jurisdiction under the first three jurisdictional tests set forth above, or where other states have declined jurisdiction.

As noted above, the respondent and the Moscow court have, through their silence, declined to assert its jurisdiction in this matter.

As it appears that the only other court with jurisdiction has declines assert it, this court has jurisdiction under Family Code § 3421(a)(4).

The Order

On September 2, 1999, Judge Cardoza issued certain custody and visitation orders in this action [Exhibit

1, Petitioner's Supplemental Points and Authorities, filed on November 26, 2002]. Mr. Synclair has requested that the court modify the previous custody and visitation order in the action based on Ms. Synclair non-compliance with the order. There is no dispute in the evidence before this Court but that Ms, Synclair has failed to comply with the order of the Fresno Superior Court. The child has not been made available for visitation as ordered and has not seen his father in several years.

Because of the undisputed evidence before this Court that the prior orders have not been complied with and because of respondents failure to provide evidence of custody order in Russia the previous order shall remain in full force and effect with the following modification: Mr. Synclair shall have interim sole legal and physical custody of Larry Synclair, Jr. until further order of the court. This modification of the previous order shall remain in effect until Mrs. Synclair complies with the custody and visitation orders made by the Fresno court.

The stay of this action is lifted.

This order shall be subject to reconsideration if the court receives a certified copy of a court order issued by the Moscow court, indicating to the satisfaction of this court that it has made child custody and/or visitation orders substantially in conformance with the UCCJEA, and that those orders remain in effect.

Conclusion

The court has been faced with a dilemma in this case. On one hand as discussed in the prior ruling Mr.

Synclair chose to raise his child in Russia with a Russian national. Clearly under the home state test, Russia would be the appropriate forum for this litigation assuming its' practices are in substantial with the UCCJEA. On the other hand, the Court has engaged in extensive efforts verify that the Russian Court has asserted jurisdiction in this matter by contacting the Court directly and by current and past requests for a certified copy of the Russian custody order from respondent.

The court has taken extraordinary measures to reach the Russian court to determine what, if any, proceedings have taken place that may affect the rights of the parents to custody and visitation of their child. Despite these efforts both the Russian court and the Respondent have remained incommunicado. The court has jurisdiction by default.

Petitioner has not seen his child since 1999, Respondent has declined to participate in this litigation after returning with the child to Russia, and there has been no attempt by any other court to assert jurisdiction in this matter. As a result, the court has no choice but to assume jurisdiction and to confirm the order issued by the Fresno court, as modified herein.

Service

The order shall be served as follows:

- Larry Synclair, 3020 Oceanside Blvd. #6, Oceanside, CA 92054
- Svetlana Synclair, Kutuzovsky prospekt 22, apt. 70, Moscow, Russia 121151 [This address shall henceforth be deemed Respondetn's address of

record].

- American Embassy, Bolshoy Devyatinskiy Pereulok No. 8, Moscow, Russia 121099
- Dororgomilovsky InterMunicipal District Court, 36 Studencheskaya St., Moscow, Russia 121165
- Garry Haenhle, San Diego County District Attorney, POB 121011, San Diego, CA 92112-1011

IT IS SO ORDERED.

DATED: 12-20-02

/s/
Jeffery Barton
Judge of the Superior Court

FILED 2002 MAY 21 A 8:23
Clerk, US Dist. Court
Eastern Dist. Of Calif.
At Fresno
By /s/ deputy

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY SYNCLAIR, SR., individually and as a parent of LARRY SYNCLAIR JR., a minor,

Plaintiff,

v.

COUNTY OF FRESNO, DEPARTMENT OF CHILD ABDUCTION UNIT, AND WILLIAM FRANK, RON HOPPER, DENNIS LEWIS, EDWARD HUNT, AND KATHY MACKIE, individually,

Defendants,

CV F 01-6546 AWI DLB

MEMORANDUM OPINION AND ORDER RE MOTION TO DISMISS FIRST AMENDED COMPLAINT

Plaintiff Larry Synclair, Sr. ("Synclair") is pursuing this civil action for damages and injunctive relief pursuant to 42

U.S.C. § 1983 alleging illations of Plaintiff's right to procedural due process and substantive due process. This court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and venue is proper in this district. Pending before the court is Defendants' motion to dismiss the first amended complaint pursuant to Rules 12(b)(6) and 12(b)(1), Federal Rules of Civil Procedure.

""29
""

ALLEGED FACTS

In his first amended complaint filed March 13, 2002, Synclair alleges in part as follows:

> 1. This is a 41 U.S.C. 1983 action brought by the plaintiff who was subjected to constitutional due process and substantive due process violations by defendants under color of law for administrative nonprosecutorial conduct, in failing to obey a November 3, 2000 order of the Superior Court of the County of Fresno, wherein defendants were ordered to cooperate with the federal authorities to ascertain the whereabouts of plaintiff's son, Larry Jr., who was born in the United States of America, but was ordered into the custody of the mother and taken to Russia. The domestic custody order is not challenged in this action. See Exhibit 1, the Superior Court Order of November 3, 2000.
>
> 5. It is alleged herein that defendant County as body politic acted unlawfully and unconstitutionally

through the official actions of defendant District Attorney Edward Hunt, who willfully acted in disobedience of the Superior Court order of November 3, 2000, and who in his official capacity additionally failed to establish policies and procedures to ensure that the individually named defendants described hereinafter, would follow orders of the Superior Court.

6. That defendant Edward Hunt as the supervising District Attorney assigned to plaintiff's case while employed by defendant County, Child Abduction Unit, wrote a letter to plaintiff on April 13, 2000 while acting in his official capacity for said defendant governmental body, informing plaintiff of said Unit's position that said County Unit would not abide by the Superior Court Order of November 3, 2000 which directed defendant Unit to cooperate with federal authorities to ascertain the whereabouts of plaintiff's son Larry Jr. who was believed to be somewhere in Russia. See Exhibit 2, the April 13 2001 letter to the plaintiff, Larry Synclair.

7. That the allegations against individually named defendants, Edward Hunt, Dennis Lewis, Ronald Hooper, and William Frank were at all relevant times employees of said County, knew of the November 3, 2000 Superior Court Order directing cooperation with federal authorities, and willfully disobeyed the directives of the Superior Court. The directive of the Superior Court was "administrative in nature" and are [sic] unrelated to the absolute

privilege regarding prosecutorial conduct that shield such action from civil liability.

8. That as a result of the failure of the defendants to abide by the order of November 3. 2000 from the Superior Court of Fresno County wherein the Court directed said defendants to cooperate with the appropriate authorities so that the whereabouts of Larry Synclair, Jr. could not be determined.

LEGAL STANDARD

In considering a motion to dismiss, the court must accept as true the allegation of the complaint in question, Hospital Bldg Co. v. Rex hospital Trustees, 425 U.S. 738, 640 (1976), construe the pleading in light most favorable to the party opposing the motion and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 reh'g denied, 396 U.S. 869 (1969). A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim that would entitle him to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). Absent unusual circumstances, dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by amendment. Change v. Chen, 80 F.3d 1293, 1296 (9th Cir.1996).

DISCUSSION

As their first main contention in support of their motion to dismiss, Defendants contend that the actions of individually named Defendants are covered by absolute immunity on two grounds. First, Defendants claim that the individually named Defendants appeared in the matter representing the Fresno County Superior Court and did not represent any party. See Cal Faml Code § 3132. Defendants argue that as so doing, the individual Defendants acted in their officials capacity pursuant to state law and that their conduct was an "integral part of the judicial process." Imbler v. Pachtman, 424 U.S. 409, 430 ((1976). Defendants claim that they, like a judicial officer, enjoy absolute immunity. See Fry . Melaragno, 939 F.2d 832m 836-37 (9th Cir. 1991)(In performing acts "intimately associated with the judicial phase" of litigation, governmental attorneys are absolutely immune).

The court finds the authorities cited by Defendants to be clearly distinguishable. In Imbler, the Court held that prosecutors are absolutely immune from civil suit for damages under section 1983 which challenge activities related to the initiation and presentation of criminal prosecutions. In Fry, 939 F.2d at 837, the court held as follows:

> We therefore agree with the Second Circuit, as it state in Barrett v. United States, 798 F.2d 565, 572-73 (2d. Cir. 1986), that the principles outlined in Butz should a fortiori apply to the government attorney's initiation

and handling of civil litigation in a state or federal court. Whether the government attorney is representing the plaintiff or the defendant, or is conducting a civil trial, criminal prosecution or an agency hearing, absolute immunity is "necessary to assure that...advocates...can perform their respective function without harassment or intimidation." Butz, 438 U.S. at 512, 98 S.Ct. at 2913. Given the similarity of function of government attorneys in civil, criminal, and agency proceedings, and the numerous checks on abuses of authority inherit in the judicial system, we reiterate our statement in Flood that "[t]he reasons supporting the doctrine of absolute immunity apply with equal force regardless of the nature of the underlying action."532 F.2d at 1251 (citation omitted). If the government attorney is performing acts "intimately associated with the judicial phase" of the litigation, that attorney is entitled to absolute immunity from damage liability.

The Court's recent decision in Burns confirms that the touchstone of this immunity is whether the attorney's actions are "intimately" or "closely" associated with the judicial process. See Burns, 111 S.Ct. at 1942044. In Burns, the Court held that the absolute prosecutorial immunity recognized in Imbler clearly covered appearances before a

> judge and presenting evidence in support of a motion for a search warrant at probable cause hearings, but did not extend to giving advice to the police in the investigative phase of a criminal case. The purpose behind absolute immunity is to "free the judicial process from the harassment and intimidation associated with litigation." 111 S.Ct. at 1943 (emphasis in original). Because the giving of legal advice was not necessarily subject to one of the most important checks on abuse of authority, the "crucible of the judicial process," and was not so closely connected with that process, the Court concluded that it did not qualify for absolute immunity. Id. at 1944 (quoting Imbler, 424 U.S. at 440, 96 S.Ct. at 999 (White, J. concurring in judgment)).

In the present case, Plaintiff does not challenge the individual Defendants' activities in connection with the handling of his child custody case before the court. Rather, as expressly stated in his first amended complaint, Plaintiff seeks to challenge Defendants' actions only in their alleged failure to obey a court order. Thus, the authorities cited by Defendants on the issue of immunities for attorneys involved in different types of judicial proceedings are distinguishable and Defendants arguments based on those authorities are not persuasive. The court therefore cannot find that Defendants are entitled to dismissal based on absolute judicial immunity.

Second, Defendants claim that by acting on behalf of the state Superior Court and being funded by the state, the individual Defendant district attorneys should be immune under the Eleventh Amendment of the United States Constitution.

"The Eleventh Amendment prohibits federal courts from hearing suits brought against an unloosening state." Brooks v. Sulphur Springs Valley Elec. Co., 951 F.2d 1050, 1053 (9th Cir 1991); see also Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); Puerto Rico Aqueduct Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993). The Eleventh Amendment prohibits suits brought by a state's own citizens as well as by the citizens of another state. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984)

Individual defendants can fall within the scope of the Eleventh Amendment when they are sued in their official capacity because "a suit against a state official is not a suit against the official but rather is a suit against the official's office." Will v. Mich. Dept. State Police, 491 U.S. 58, 71 (1989); Pena v. Gardner, 976 F.2d 469, 473-74 (9th Cir. 1992).

In support of their argument that the individual Defendants are entitled to the Eleventh Amendment immunity, Defendants cite only Pitts v. County of kern, 17 Cal. 4th 240, 361-62 (1998), in which the California Supreme Court concluded that state constitutional and statutory provisions make district attorneys state officials when they are preparing to prosecute and prosecute violation of state criminal laws. This holding is not directly

applicable to the present case, which did not involve a criminal prosecution, and Defendants provide no discussion. Further, Defendants do not mention the recent federal authority in this area of law, including Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001), in which the court expressly rejected the view that state law controls in determining whether an official is a state actor for the purposes of Section 1983 litigation. The court held in part:

> Although we must consider the state's legal characterization of the government entities which are parties to these actions, federal law provides the rule of decision in section 1983 actions. See Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 430 n. 5, 117 S.Ct. 900, 137 L.Ed.2d. 55 (1997) (finding that "the question whether particular state agency has the same kind of independent status as a county... is a question of federal law...[b]ut that federal question can be answered only after considering the provisions of state law that define the agency's character."); City of St. Louis v. Praprotnik, 485 U.S. 112, 124 108 S.Ct. 915, 99 L.Ed.2d. 107 (1988) (noting that "the identification of policymaking officials is a question of state law"). And, although it may be instructive on questions of liability in certain specific contexts, state law does not control our

> interpretation of a federal statute. To trigger section 1983 liability, plaintiffs must claim that their "rights, privileges, or immunities secured by the Constitution and [federal] laws" have been violated under colot of law or action. 42 U.S.C. § 1983. "The elements of, and the defenses to, a federal cause of action are defined by federal law." Howlett v. Rose, 496 U.S. 356, 375, 110 S.Ct. 2430, 110 L.ed.2d 332 (1990). Therefore, federal courts have generally recognized the primary importance of federal law in section 1983 litigation. See Howlett, 496 U.S. at 376, 110 S.Ct. 2430; Monell, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611; Tiemann v. Tul-Center, Inc., 18 F. 3d 851 (19th Cir. 1994); Larez v. Holcomb, 16 F.3d 1513, 1520 ((th Cir. 1994).

Id. At 560 In light of the above, the court finds that Defendants have not demonstrated that they are entitled to dismissal based on Eleventh Amendment immunity.

As their second main contention in support of their motion to dismiss, Defendants contend that they are entitled to qualified immunity. In Mena v. City of Simi Valley, 226 F.3d 1031, 1036 (9th Cir. 2000), the Ninth Circuit explained the analysis for qualified immunity as follows:

> We review de novo a district court's decision denying summary judgment on the ground of qualified immunity. Moran v. Washington,

> 147 F.2d 830, 844 (9th Cir. 1998). In deciding whether Defendants are entitled as a matter of law to qualified immunity, we must accept the facts in the light most favorable to the Plaintiffs and then determine whether, in light of clearly established principles governing the conduct in question, the officers objectively could have believed that they copnduct was lawful. See Brewster v. Bd. Of Educ. Of Lynnwood Unified School Dist. 149 F3d 971 (9th Cir. 1998); Act Up/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993). "This standard requires a two-part analysis: 1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" Id.

The Supreme Court has rejected the Ninth Circuit's line of cases holding that plaintiffs were required "to put in the district court record, as 'legal facts,' the cases showing that the right asserted was 'clearly established.'" Elder v. Holloway, 510 U.S. 514, 114 S.Ct. 1019, 1022 (1994). Instead, the determination "[w][hether an asserted federal right was clearly established at a particular time...presents a question of law." Id. at 526, 116 S. Ct. at 1026. Accordingly, a court "should use it full knowledge of its own [and other relevant] precedents" when ruling on a claim of qualified immunity. Id. (quoting Davis v. Scherer, 468 U.S. 183, 192 n. 9, 104 S.Ct. 3012, 3018 n. 9 (1983)

(brackets in original).

The main body of the Fresno County Superior Court Order of November 3, 2000 provides as follows:

> 1. Fresno county [sic] has jurisdiction over subject matter of this proceeding as there has not been confirmation from the Russian Federation stating otherwise, nor has there been filed a certified copy of a court order from the Russian Federation indication otherwise.
> 2. Petitioner, Larry Synclair, shall have a minimum of four weeks visitation with the minor child of the parties, Larry Synclair, Jr., which shall include the Christmas Holidays, as permitted by flight schedules. Respondent shall be responsible for the costs of the round trip air fare, however, Petitioner is purchase the tickets that can be used at any time, to be available when the minor child of the parties, Larry Synclair, Jr. has been located. Respondent is to reimburse Petitioner within 30 days of the receipt of the tickets.
> 3. The Court further grants Petitioner's oral motion for an Order Shortening Time for notice of motion directed to the District Attorney of Fresno County to release the address of Respondent, pursuant to Family Code Section 17512. The motion is scheduled to be heard on December 6, 2000, in

Department 33 of the above entitled Court, at 9:00 A.M. This Order After Hearing shall be deemed notice of that hearing and shall be served upon the Respondent by the Office of the District Attorney of Fresno County, Child Abduction Unit.

4. The District Attorney of Fresno County, Child Abduction Unit, shall take all steps necessary to assist various government agencies, both in the United States and in the Russian Federation, to carry out compliance with this order.

Plaintiff subsequently received from Deputy Fresno Country District Attorney Dennis L. Lewis a letter dated April 13, 2001, which provides as follows:

Dear Mr. Synclair:

Your letter of April 9, 2001 has been forwarded to my attention. I have reviewed the pertinent pleadings, investigation reports and correspondence in our files. As a result of my review, I believe that the only proper action for this office would be to ask the Fresno County Superior Court to vacate all orders subsequent to finding that Russia is the home state of Larry Synclair, Jr.

As you know, any order issued absent

> proper jurisdiction is void *ab initio*. Simply put, this office cannot enforce an invalid order. Further, we cannot make any demands upon the Russian executive or judicial system to enforce these invalid orders.
>
> I presume your attorney, Mr. Shapiro, discussed with you the issues associated with the fact that Russian is a non-Hague Convention nation. I know that many parents are frustrated by the fact that they must litigate custody in the Russian judicial system. The matter is further complicated by the fact that federal law prohibits our consular and diplomatic officers from performing even the smallest legal services. However, these facts do not alter the reality that nothing further can be done in Fresno County.

In support of their motion to dismiss, Defendants do not discuss whether the right to procedural and substantive die process were clearly established, and therefore appear to concede that point. Moving to the second element of qualified immunity, Defendants present the following argument as to why a district attorney could have believed the conduct in question was lawful:

> The conduct of Defendants in this case is further objectively reasonable. The letter from Defendant Dennis Lewis to Plaintiff dated April 13, 2001, and attached as Exhibit 2 to

> the amended complaint, sets forth clearly several reasons why the District Attorney's Office could not assist. One of the reason is because Russia is not signatory to the Hague Convention on International Child Abduction. Under the local rules, the District Attorney can only "... enforce compliance with custody/visitation orders in the proper jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the Federal Parental Kidnapping Act, (28 U.S.C. 1738A) and the Hague Convention on International Child Abduction (42 U.S.C. 11601 et seq.)." *Fresno County Superior Court Local Rule 35.5(C)(3).* By not being a party to the Hague Convention, the Fresno County Superior Court order and the District Attorney's Office have no authority in Russia.

The court finds that although Defendants rely on Mr. Lewis' letter to establish the reasonableness of their inaction, Defendants argument fails to address the actual language set forth in Mr. Lewis' letter. For example, Defendants ignore the fact that Mr. Lewis first states in his letter that he "believes" that "the only proper action" for the office of the District Attorney "would be to ask the Fresno County Superior Court to vacate all orders subsequent to the finding that Russia is the home state of Larry Synclair, Jr." Mr. Lewis does not explain whether this would include the Order of November 3, 2000. Moreover, by using such

vague language, Mr. Lewis does not whether such a motion to vacate has yet been filed or will be filed at any particular future date, or, most importantly, on what basis such a motion would be made.

Defendants also ignore the fact that Mr. Lewis next states that any order issued absent proper jurisdiction is void *ab initio*, and declares that the District Attorney's Office cannot enforce an invalid order. Mr. Lewis, however, provides no explanation of his apparent, although unspoken, assumption that the Order of November 3, 2000 is invalid.

Finally, Mr. Lewis states that Russia is a non-Hague Convention nation and that parents must litigate custody in the Russian judicial system. Reliance on this language by Defendants ignores the express language in the First Amended Complaint that "[t]he domestic custody order is not challenged in this action." Mr. Lewis also states that federal law prohibits United States consular and diplomatic officers from performing legal services, which of course has no relevance to the present case. He then concludes that nothing further can be done in Fresno County.

The court finds while such an explanation may exist, none of the vague and conclusory language in Mr. Lewis' letter provides a reasonable explanation as to why the District Attorney of Fresno County, Child Abduction Unit, did not comply with the express language of the November 3, 2000 Order of Fresno County Superior Court that it "take all steps necessary to assist various governmental agencies, both in United States and the Russian Federation, to carry out compliance with this

order." Further, Defendants' claim that Fresno County could not "enforce complaince with custody/visitation orders" also ignores the language of the order, which requires assistance, not enforcement. The court must conclude, therefore, that Defendants have not established the second element of qualified immunity, and that Defendants are not entitled to dismissal of this action based on qualified immunity.

Defendants' third main contention is that Plaintiff has not shown as to the liability to the governmental entity Defendants. Defendants argue that Plaintiff has made only a conclusory allegation that the District Attorney or District Attorney's office failed to establish policies and procedures, with no further facts or details being given. Defendants also argue that Plaintiff has failed to show that the entity Defendants acted with deliberate indifference or that his alleged injury would have been avoided had the District Attorney of his Office established some type of policies and procedures.

A local government unit may not be held responsible for the acts of its employees under a respondent superior theory of liability. Monell v. Department of Social Services, 436 U.S. 658, 691 (1978). Rather, to state a claim for municipal or county liability, a plaintiff must allege that he suffered a constitutional deprivation that was the product of a policy or custom of the local government unit. City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989).

In the present case, Plaintiff alleges that the District Attorney "failed to establish policies and procedures to ensure that the individually named defendants... would

follow orders of the Superior Court, "and that the Child Abduction Unit failed to "establish policies and procedures where state employees are trained torn force or appeal otherwise valid state court orders." The court finds that contrary to Defendants' claim, Plaintiff has not made only a conclusory allegation, but has sufficiently identified what policies and procedures are at issue. Further, the court finds that it cannot conclude beyond doubt that plaintiff can prove no set of facts in support of the claim that would establish deliberate indifference and causation. Accordingly, the court concludes that Defendants have not established that they are entitled to dismissal of the claims against the governmental entities.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Defendants' motion to dismiss the first amended complaint is DENIED. Pursuant to Rule 12(a)(4)(A), Defendants shall file an answer within ten (10) days of the date of service of this order.

DATED: 5-21-02 /s/
ANTHONY W. ISHII
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT THE EASTERN DIVISION OF CALIFORNIA

LARRY SYNCLAIR, SR.

Plaintiff,

v.

COUNTY OF FRESNO, DEPARTMENT OF CHILD ABDUCTION UNIT, AND WILLIAM FRANK, RON HOPPER, DENNIS LEWIS, EDWARD HUNT, individually,

Defendants,

CV F 01-6546 AWI DLB

FILED
2002 MAR 13 P 2:59
CLERK, US DISTRICT COURT
EASTERN DIST. OF CALIF.
BY /s/ DEPUTY

AMENDED COMPLAINT AT LAW

NOW COMES plaintiffs, by their attorney, and complains against the above named defendants as follows:

NATURE OF THE ACTION

1. This is a 42 U.S.C. 1983 action brought by the plaintiff who was subjected to the constitutional due process and substantive due process violations by defendants under color of law for administrative no prosecutorial conduct, in failing to obey a November 3, 2000 Order of the Superior Court of the County of Fresno, wherein defendants were ordered to cooperate with federal authorities to ascertain the whereabouts of plaintiff's son, Larry Jr., who was born in the United States of America, but was ordered into the custody of the mother and taken to Russia. The domestic custody order is not challenged in this action. See Exhibit 1, the Superior Court Order of November 2, 2000.

JURISDICTION AND VENUE

2. JURISDICTION arises under the Constitution of the United States, and specifically the Fourth, and Fourteenth Amendment to the U.S. Constitution, and the Civil Rights Act, 42 U.S.C. Section 1983.

VENUE arises in the Eastern Division of California, United States District Court where all of the complained of actions herein took place within the County of Fresno.

COUNT I
PROCEDURAL DUE PROCESS
PARTIES

3. That the plaintiff Larry Synclair was and is a citizen of

the United States of America and at all relevant times in this complaint was a citizen of the State of California and the county of Fresno.

4. The defendant County of Fresno, is a body politic that includes a Child Abduction Unit division which is alleged to be sworn to follow the orders of the Superior Court of the County of Fresno.

5. It is alleged herein the defendant County as a body politic acted unlawfully and unconstitutionally through the official actions of defendant District Attorney Edward Hunt, who willfully acted in disobedience of the Superior Court Order of November 3, 2000, and who in his official capacity additionally failed to establish policies and procedures to ensure that the individually named defendants described hereinafter, would follow orders of the Superior Court.

6. The defendant Edward Hunt as the supervising District Attorney assigned to plaintiff's case while employed by the defendant County, Child Abduction Unit, wrote a letter to Plaintiff on April 13, 2000 while acting in his official capacity for said defendant governmental body, informing plaintiff of said Unit's position that said County Unit would not abide by the Superior Court Order of November 3, 2000, which directed said defendant Unite to cooperate with federal authorities to ascertain the whereabouts of plaintiff's son Larry Jr. who was believed to be somewhere in Russia. See Exhibit 2, the April 13, 2001 letter to plaintiff, Larry Synclair.

7. The allegation against individually named defendants, Edward Hunt, Dennis Lewis, Ronald Hopper,

and William Frank were at all relevant times employees of said County, knew of the November 3, 2000 Superior Court order directing cooperation with federal authorities, and willfully disobeyed the directives of the Superior Court. The directive of the Superior Court was "administrative in nature" and are unrelated to the absolute privilege regarding prosecutorial conduct that shield such action from civil liability.

8. That as a result of the failure of the defendants to abide by the order of November 3, 2000 from the Superior Court of Fresno County wherein the Court directed said defendants to cooperate with the appropriate authorities so that the whereabouts of Larry Synclair, Jr. could not be determined

9. That the defendants unilateral decision not to obey the aforesaid November Court Order was unlawful because said decisions not to cooperate with federal authorities was in contravention to the expressed duties of said defendants to uphold the laws as defined by the Superior Court of Fresno County, or to take appellate procedures to rectify a law reasonable believed to a be departure from established precedent.

10. The defendants actions were concluded unlawfully because defendants chose not to appeal the decision, and on their own discretion declared the aforesaid Superior Court Order to be nonenforceable and solely a federal law issue.

11. That the defendants decision not to obey the aforesaid Court order was a decision by defendants acting under color of law which violated well establish legal rights that are protected under U.S.C. section 1983, against

defendant County, and individual employees for their official and in their individual administrative capacities acting in a manner that deprived plaintiff, a citizen, of those protected and substantial Constitutional rights.

12. That defendant Unit also violated the constitutional protections of the plaintiff by failing to establish policies and procedures where state employees are trained to enforce or appeal otherwise valid state court orders, including the November 3, 2000 order herein.

13. That defendants by failing to act in accordance with the aforesaid judicial order of cooperation with federal authorities, the procedural due process rights of plaintiff were violated by these wrongful unilateral and unlawful actions, since the defendants decision not to enforce the Court Order deprived plaintiff of his due process rights as mandated by established long standing legal procedure forbidding governmental authorities such as defendants from unilaterally failing to enforce legal orders from state court as herein.

14. That the plaintiff alleges as direct and proximate cause of failure of defendants to comply with the order of the Superior Court of Fresno County, the federal authorities did not initiate the investigation with federal authorities, and prevented any federal or international investigation, such as alerting the Interpol Offices in the United States or the F.B.I. In Russia from assisting.

15. That the plaintiff as a result of the administrative failures of defendants herein to abide by the Superior Court order, suffered great emotional pain and mental anguish at the lack of knowledge of Larry Synclair, Jr.'s whereabouts,

having so suffered for over a year as a result of the defendants Constitutional violations described herein.

Wherefore, plaintiff Larry Synclair, Sr., prays for judgment against defendants County of Fresno, Edward Hunt, William Frank, Ronald Hopper, and Dennis Lewis, jointly and severally, for compensatory damages in the amount of two million dollars, and further demand judgment against each of said defendants, jointly and severally, for punitive damages in the amount of four million dollars, plus attorney fees, and costs of this action and other relief that this Honorable Court deems just, proper, and equitable.

COUNT II

SUBSTANTIVE DUE PROCESS

1. That plaintiff repeats and realleges paragraphs one through twelve of this Count II with the same force and effect as though fully set forth herein.

13. The defendants wrongful and unilateral determination that the November 3, 2000 Court Order was void is the factual basis for the claims asserted herein, that the defendants official and individual actions were a violation of the plaintiff's substantive due process rights as protected under the Fourth and Fourteenth Amendment to the United States Constitution because said unlawful decision amounted to an unlawful interference with the plaintiff's right to parent his child, Larry Jr., which is establish constitutional right which defendants violated because defendants wrongful actions were contrary to their duties to abide by Superior Court Orders, and in so failing

to act interfered with plaintiff's well-established Constitutional Rights of parents.

14. That the plaintiff as a result of the administrative failures of defendants herein abide by the Superior Court order, suffered great emotional pain and mental anguish at the lack of knowledge of Larry Synclair, Jr.'s whereabouts, having so suffered for over a year as a result of the defendants Constitutional violations described herein.

Wherefore, plaintiff Larry Synclair, Sr. prays for judgment against defendants County of Fresno, Edward Hunt, William Frank, Ronald Hopper, and Dennis Lewis, jointly and severally, for compensatory damages in the amount of four million dollars, plus attorney fees, and costs of this action and other relief that this Honorable Court deems just, proper, and equitable.

/s/
Keith Schneider, Esq.
Schneider and Schneider, P.C.
Attorney at Law
1620 W. Northwest Highway
Arlington Heights, Illinois 60004
847-222-8040

EXHIBIT 1

FILED
FRESSNO COUNTY SUPERIOR COURT
00 NOV-3 PM 3:49

JERRY SHAPIRO SBN 62740
Attorney at Law
285 West Shaw Avenue, Suite 207
Fresno, California 93704

Telephone (559) 224-9450

Attorney for Petitioner, Larry Synclair

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

In re the Marriage of:
Petitioner LARRY SYNCLAIR
and
Respondent SVETLANA SYNCLAIR

CASE NO: 626188-7
ORDERAFTER HEARING

The above entitled matter came on regularly for hearing on November 3, 2000, at 9:00 A.M., in Department 33 of the above entitled Court, the Honorable Nancy Cisneros, presiding. Petitioner, Larry Synclair, appeared in person, represented by attorney Jerry Shapiro, the County of Fresno, District Attorney's Office, Child Abduction Unit, appeared represented by Attorney Bill Frank, and Respondent, Svetlana Synclair did not appear.

AFTER CONSIDERING THE MOVING PAPERS

AND HEARING ORAL ARGUMENT, THE COURT MAKES THE FOLLOWING ORDERS:

1. Fresno county has jurisdiction over the subject matter of this proceeding as there has not been confirmation from the Russian Federation stating otherwise, nor has there been filed a certified copy of a court order from the Russian Federation indication otherwise.
2. Petitioner, Larry Synclair, shall have a minimum of four weeks visitation with the minor child of the parties, Larry Synclair, Jr., which shall include the Christmas Holidays, as permitted by flight schedules. Respondent shall be responsible for the costs of the round trip air fare, however, Petitioner is purchase the tickets that can be used at any time, to be available when the minor child of the parties, Larry Synclair, Jr. has been located. Respondent is to reimburse Petitioner within 30 days of the receipt of the tickets.
3. The Court further grants Petitioner's oral motion for an Order Shortening Time for notice of motion directed to the District Attorney of Fresno County to release the address of Respondent, pursuant to Family Code Section 17512. The motion is scheduled to be heard on December 6, 2000, in Department 33 of the above entitled Court, at 9:00 A.M. This Order After Hearing shall be deemed notice of that hearing and shall be served upon the Respondent by the Office of the District Attorney of Fresno County, Child Abduction Unit.
4. The District Attorney of Fresno County, Child Abduction Unit, shall take all steps necessary to assist various

government agencies, both in the United States and in the Russian Federation, to carry out compliance with this order.
APPROVED AS TO FORM AND CONTENT

DATED: NOVEMBER 3, 2000
/s/
BILL FRANK
Deputy District Attorney, Fresno County
Child Abduction Unit

IT IS SO ORDERED

DATED: NOV 03 2000

/s/
NANCY ANN CISNEROS
JUDGE OF THE SUPERIOR COURT

EXHIBIT 2

COUNTY OF FRESNO EDWARD W. HUNT
DISTRICT ATTORNEY

April 13, 2001

Mr. Larry Synclair
3020 Oceanside Ave. #6

Oceanside, CA 92054

Re: Your letter of April 9, 2001

Dear Mr. Synclair:

Your letter of April 9, 2001 has been forwarded to my attention. I have reviewed the pertinent pleadings, investigation reports and correspondence in our files. As a result of my review, I believe that the only proper action for this office would be to ask the Fresno County Superior Court to vacate all orders subsequent to finding that Russia is the home state of Larry Synclair, Jr.

As you know, any order issued absent proper jurisdiction is void *ab initio.* Simply put, this office cannot enforce an invalid order. Further, we cannot make any demands upon the Russian executive or judicial system to enforce these invalid orders.

I presume your attorney, Mr. Shapiro, discussed with you the issues associated with the fact that Russian is a non-Hague Convention nation. I know that many parents are frustrated by the fact that they must litigate custody in the Russian judicial system. The matter is further complicated by the fact that federal law prohibits our consular and diplomatic officers from performing even the smallest legal services. However, these facts do not alter the reality that nothing further can be done in Fresno County.

Sincerely,

Edward Hunt
Fresno County District Attorney

/s/
Dennis L. Lewis
Deputy District Attorney

PROOF OF SERVICE

SYNCLAIR, SR., VS COUNTY OF FRESNO, ET AL.
U.S. District Court Case No. CIV F-01-6546 AWI DLB

I, MYRA SCHNEIDER, declares as follows:

I am a resident of the State of Illinois, over the age of eighteen years, and not a party to the within action.

On March 12, 2002, I served a copy(ies) of the within

AMENDED COMPLAINT AT LAW

on the interested party(ies) in said action addressed as follows:

Phillip S. Cronin, Esq. County Counsel
William F. Mar, Jr., Esq Senior Deputy
2220 Tulare Street, 5th Floor
Fresno, CA 93721

by placin the document(s) listed above for mailing in the United Sates mail at Arlington Heights, Illnois, in accordance with counsels address for collection and processing of mail, and addressed as set forth above.

I declare under penalty of perjury under the laws of the State that the foregoing is true and correct.

Executed on March 12, 2002

/s/
MYRA SCHNEIDER

FILED
JAN 02 2002
FRESNO COUNTY SUPERIOR COURT
BY /s/
B.H. - DEPUTY

Larry Ross Synclair
3020 Oceanside Blvd., #6
Oceanside, CA 92054
Telephone: (760) 966-0079
Plaintiff in Propria Persona

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

In re the Marriage of:
LARRY SYNCLAIR
Petitioner,
Vs.
SVETLANA SYNCLAIR
Respondent,

Case no.: 626188-7
ORDER AFTER HEARING

The above entitled matter came on regularly for hearing on December 21, 2001, at 1:30 P.M. in Department 73 of the above entitled Court, the Honorable David C. Kalemkarian, presiding. Petitioner, Larry Synclair, appeared in person *in*

pro se, the County of Fresno, District Attorney's Office, Child Abduction Unit appeared, represented by Attorney Dennis Lewis, and Respondent Svetlana Synclair did not appear.

AFTER CONSIDERING THE MOVING PAPERS AND HEARING ORAL ARGUMENTS REGARDING THE MOTION FOR CHANGE OF VENUE, THE COURT MAKES THE FOLLOWING ORDERS:

1. The Motion for a Change of Venue has been granted to Plaintiff.
2. The Superior Court of California, County of Fresno hereby transfers all files of Case No. 626188-7 to the Superior Court of California, County of San Diego, located at 325 South Melrose Road, Vista, California, 92083.

APPROVED AS TO FORM AND CONTENT

DATED DECEMBER 28, 2001

Dennis Lewis
Deputy District Attorney
Fresno Country District Attorney's Office
Child Abduction Unit

IT IS SO ORDERED
JAN -2 2002 /s/
DATE (David C. Kalemkarian)
Judge Of The Superior Court

[STAMP]
The foregoing instrument is a correct copy of the original on file in this office

ATTEST FEB 04 2002

TAMARA L. BEARD, Superior Court Clerk
State of California, County of Fresno
By /s/, Deputy

COUNTY OF FRESNO EDWARD W. HUNT
DISTRICT ATTORNEY

April 13, 2001

Mr. Larry Synclair
3020 Oceanside Ave. #6
Oceanside, CA 92054

Re: Your letter of April 9, 2001

Dear Mr. Synclair:

Your letter of April 9, 2001 has been forwarded to my attention. I have reviewed the pertinent pleadings, investigation reports and correspondence in our files. As a result of my review, I believe that the only proper action for this office would be to ask the Fresno County Superior Court to vacate all orders subsequent to finding that Russia is the home state of Larry Synclair, Jr.

As you know, any order issued absent proper jurisdiction is void *ab initio*. Simply put, this office cannot enforce an invalid order. Further, we cannot make any demands upon the Russian executive or judicial system to enforce these invalid orders.

I presume your attorney, Mr. Shapiro, discussed with you the issues associated with the fact that Russian is a non-Hague Convention nation. I know that many parents are frustrated by the fact that they must litigate custody in

the Russian judicial system. The matter is further complicated by the fact that federal law prohibits our consular and diplomatic officers from performing even the smallest legal services. However, these facts do not alter the reality that nothing further can be done in Fresno County.

Sincerely,
Edward Hunt
Fresno County District Attorney

/s/
Dennis L. Lewis
Deputy District Attorney

FILED
FRESSNO COUNTY SUPERIOR COURT
00 NOV-3 PM 3:49

JERRY SHAPIRO SBN 62740
Attorney at Law
285 West Shaw Avenue, Suite 207
Fresno, California 93704

Telephone (559) 224-9450

Attorney for Petitioner, Larry Synclair

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

In re the Marriage of:
Petitioner LARRY SYNCLAIR
and
Respondent SVETLANA SYNCLAIR

CASE NO: 626188-7
ORDERAFTER HEARING

The above entitled matter came on regularly for hearing on November 3, 2000, at 9:00 A.M., in Department 33 of the above entitled Court, the Honorable Nancy Cisneros, presiding. Peitioner, larry Synclair, appeared in person, represented by attorney Jerry Shapiro, the County of

Fresno, District Attorney's Office, Child Abduction Unit, appeared represented by Attorney Bill Frank, and Respondent, Svetlana Synclair did not appear.

AFTER CONSIDERING THE MOVING PAPERS AND HEARING ORAL ARGUMENT, THE COURT MAKES THE FOLLOWING ORDERS:

1. Fresno county has jurisdiction over the subject matter of this proceeding as there has not been confirmation from the Russian Federation stating otherwise, nor has there been filed a certified copy of a court order from the Russian Federation indication otherwise.
2. Petitioner, Larry Synclair, shall have a minimum of four weeks visitation with the minor child of the parties, Larry Synclair, Jr., which shall include the Christmas Holidays, as permitted by flight schedules. Respondent shall be responsible for the costs of the round trip air fare, however, Petitioner is purchase the tickets that can be used at any time, to be available when the minor child of the parties, Larry Synclair, Jr. has been located. Respondent is to reimburse Petitioner within 30 days of the receipt of the tickets.
3. The Court further grants Petitioner's oral motion for an Order Shortening Time for notice of motion directed to the District Attorney of Fresno County to release the address of Respondent, pursuant to Family Code Section 17512. The motion is scheduled to be heard on December 6, 2000, in Department 33 of the above entitled Court, at 9:00 A.M. This Order After Hearing shall be deemed notice of that hearing and shall be served upon the Respondent by the

Office of the District Attorney of Fresno County, Child Abduction Unit.

4. The District Attorney of Fresno County, Child Abduction Unit, shall take all steps necessary to assist various government agencies, both in the United States and in the Russian Federation, to carry out compliance with this order.

APPROVED AS TO FORM AND CONTENT

DATED: NOVEMBER 3, 2000
/s/
BILL FRANK
Deputy District Attorney, Fresno County
Child Abduction Unit

IT IS SO ORDERED

DATED: NOV 03 2000

NANCY ANN CISNEROS
JUDGE OF THE SUPERIOR COURT

FILED
FRESNO COUNTY SUPERIOR COURT
99 SEP -2 AM 11:26
/s/

Yoshi Asanuma, MFC III
Fresno County Superior Court
Family Court Services
2220 Tulare, Ste 111
Fresno, CA 93721
559/488-3241

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FRESNO
CENTRAL DIVISION

In re the Marriage of :
Petitioner: LARRY SYNCLAIR
And
Respondent: SVETLANA SYNCLAIR

Case Number: #626188-7 Dept. 70
RECOMMENDATION OF FAMILY COURT
COUNSELOR AND ORDER RE CHILD CUSTODY

TO THE HONORABLE JUDGE OF THE ABOVE ENTITLED COURT:
The following recommendation is submitted in the above-entitled action:
1.00 INTRODUCTION

1.01 In the following, the term father shall mean petitioner, the term mother shall mean respondent, and the term child shall mean Larry, jr., DOB 5/14/95

1.02 The parents have met at in-court mediation on 8/31/99, and have not reached agreement. The following recommended parenting plan is submitted in the best interest of the child to amicably resolve the controversy.

1.03 It is the intent of this order that each parent shall exert every effort to maintain access and contact between the child and the other parent.

1.04 Parents shall neither do or say anything in the presence of the child that will diminish the love and affection the child has for the other parent. The parents shall not question the child about the personal life of the other parent, nor discuss custody, visitation or child support issues in the presence of the child, or question the child about where they want to live. Parents shall neither argue nor insult each other in the presence of the child, or allow any third party to do so. Both parents shall encourage the child to be with the other parent and make the transition from one parent to the other parent as easiest as possible.

1.05 The parents may supplement or revise the terms and conditions of this custody arrangement as the needs of the child's change(s). Such changes shall be in writing and signed by both parents. If controversy arises, the existing order of the court shall remain in full force and effect pending further order of the court.

2.00 LEGAL CUSTODY RIGHTS AND RESPONSIBILITIES

2.01 The parents shall have joint legal custody which shall

include the following rights and responsibilities. If those rights or responsibilities require mutual consent, failure to obtain mutual consent prior to implementation may be considered in any future hearing regarding custody or visitation. Such action may be considered a change of circumstance.

2>02 Each parent shall be empowered to obtain emergency health care for the child without the consent of the other parent. Each parent is to notify the other parent when reasonably possible of any illness requiring medical attention, or any emergency involving the child.

2.03 The parents shall consult and cooperate with each other on substantial questions relating to religious upbringing, educational programs, significant changes in social environment and health care of the child.

2.04 When the child is with the mother, the mother shall select all schools, health care providers, day care providers, and counselors and when the child is with the father, the father shall select all health care providers, day care providers, and counselors.

2.05 Each parent is to provide the other parent promptly with information, within five days from the date the parent received the information, concerning the well-being of the child, including but not limited to copies of report cards, school meeting notices; vacation schedules; class tests; notices of activities involving the child; samples of school work; order forms for school pictures, significant communications from health care providers, the names, address and telephone number off all school, health care providers, regular day care providers, and counselors. Both

parents may participate in school activities for the child such as open house, attendance at an athletic event, etc.

2.06 Each parent is to provide the other parent with the address and telephone number at which each parent resides, and to notify the other parent within two days of any changes of address or telephone number. The information shall not be used for harassing or annoying each other.

2.07 Each parent shall provide the other parent with a telephone number where they may be contacted in case of emergency or message regarding the child.

2.08 Each parent shall be entitled to reasonable telephone communication with the child. The parents are restrained from unreasonably interfering with the child's right to privacy during such telephone conversations. Neither parent shall use the telephone for obtaining information from the child regarding the other parent.

2.09 The father shall send the child a video recording by the 10th of each month. The video recording should keep the child in mind always. For example, talk to the child, read a story to the child, play games, ie peek-a-boo, do something around the home. The mother shall play these recording to the child within 5 days after receiving the videotape and continue to play them upon the child's request.

Further the father shall send the child child-appropriate correspondence via E-mail once per week. The mother shall read to the child the correspondence within 24 hours after receiving the E-mail.

2.10 Each parent shall reinforce the child's bilingual ability. Each parent shall converse with the child in English

and Russian.

2.11 When the child is with the mother the mother shall use the American Medical Clinic or the International Medical Clinic when seeking medical care for the child.

3.00 PHYSICAL CUSTODY RIGHTS AND RESPONSIBILITIES/VISITATION PLAN

3.01 The parents shall have joint physical custody which means that each parent shall have significant periods of physical custody. The parents shall share joint physical custody in a way that assures the child has frequent and continuing contact with both parents according to the following parenting plan:

3.02 Commencing 9/1/99 at 8:00a.m. the child shall reside primarily with the mother, except for specific periods of time outlined below commencing with the date of the signing of this order.

3.03 The child's residence shall be alternated in such a way that the sharing of physical care causes no substantial disruption of the child's schooling, family and social relationships.

3.04 Whenever the father visits Russia, with at least a one month advance written notice to the mother, the child shall reside with the father for more than three consecutive months per year. The exchange time shall be 6 p.m. During this period the mother shall have the child on alternate weekends from Friday 6 p.m. until Sunday at 6 p.m. commencing the second weekend after the vacation begins with the father.

4.00 GENERAL RIGHTS AND RESPONSIBILITIES

4.01 The parents are restrained from unreasonable interfering with the right of the child to transport his clothing and possessions freely between parental homes.

4.02 The father shall notify the mother at least one month in advance if he is unable exercise the regular scheduled visitation.

4.03 The child shall be picked up and returned at the designated times. Should a delay become necessary, the delayed parent shall immediately advise the other parent of the delay and the estimated length of time.

4.04 When the child is with the father in Russia, responsibility for providing the child transportation to and from the visit shall be arranged by the father.

4.05 When the child is with the father in the United States, the child shall be transported by an air carrier. The mother shall be responsible for the cost of the round-trip ticket for the child from Moscow, Russia and San Francisco, California, United States. The father shall purchase the total cost of the round-trip ticket and send written confirmation of the total cost and the flight schedule to the mother within 10 days after he purchases the ticket. The mother shall reimburse the father for the cost (U.S. equivalency currency) of the round-trip ticket within 10 days after receiving confirmation. If the airline requires a parent to accompany the child the mother shall pay the total cost of her round-trip ticket. Failure for the mother to send her share of the cost to the father as described in this order may be considered a change of circumstances and this custody order may be modified.

4.06 The parents shall abstain from all psychoactive drugs not medically prescribed. The parents shall abstain from the use of alcohol 24 hours prior to and while the child is with them. If a parent appears to be violating this order then the other parent may call law enforcement to make a determination as to such violation.

4.07 When the child is in the care of either parent, that parent shall not associate with anyone who is using alcohol and/or illicit drugs. It is the responsibility of each parent to provide the child with a drug free environment and a sober environment.

5.00 PROTECTION OF RIGHTS AND RESPONSIBILITIES

5.01 Neither parent shall remove the child from the Country of Russia or the State of California in the United States of America, for the purpose of changing the child's residence without the written consent of both parent or until further order of the court.

5.02 The parents are to obey all Vehicle Codes laws. Safety restraints such as seat belts and/or child car seats are to be used always. In the event a parent who is to exercise time with the child does not meet the Vehicle Code requirements that time shall be forfeited.

5.03 Failure to obey this order shall be deemed a violation of Sections 166.4, 273.6, 278, 278.5 and 279 of the California Penal Code and appropriate law enforcement agencies are directed to secure compliance of this order.

5.04 A certified copy of this order must be filed with the Sheriff's Department of each county noted in this order and to the child's school.

0o0

Date: 09-01-99

/s/
Family Court Mediator
Yoshi Asanuma

ORDER

The above-mentioned recommendation having been read and considered and good cause appearing to the court:

IT IS HEREBY
(X) SO ORDERED
( ) SO ORDERED AS MODIFIED
( ) PARTIES HAVE 15 DAYS TO FILE WRITTEN OBJECTIONS

Dated: Fresno, California 9/2/99 /s/
(Jane Cardoza)
Judge of the Superior Court

APP. 93

Devora Goldberg-Lockton
1709 Butters Rd
Carlsbad, California 92008
760 729 6939
Psychologist psy 10359

February 21, 2003

Larry Synclair has been in treatment with me since August 27, 2002. He was referred by the Victim Compensation and Government Claims Board which is part of the Victims of Crime Division of the State of California.

Mr. Synclair is suffering from Post Traumatic Stress Disorder DSM IVR 309.81 brought on by the trauma of having his son Larry Synclair Jr. kidnapped by his former wife in July 1999. His son is now residing in Russia. Mr. Synclair has not had contact with his on for several years. He is very worried about the physical and emotional health of his son.

Mr. Synclair has attempted to have the legal system declare his son a kidnapped child so that he can attempt to resume custody of his son with the assistance of the American Legal System. The lack of response by the American authorities including the District Attorney to assist him has been especially troubling for Mr. Synclair. He has felt abandoned and disregarded by his country.

As Mr. Synclair continues to seek redress under the legal

system, the initial trauma from the crime of the kidnapping becomes reactivated. He is attempting to exercise his custody of Larry Synclair Jr., through the courts; a lengthy and costly process. While time is going by, his son is getting older and Mr. Synclair remains very upset because of the lack of direct contact with his son. The fact that the American embassy has also been denied contact with his son adds to his concern that his son is being mistreated.

Mr. Synclair is suffering from intrusive distressing recollections of his son and the last time they were together. These intrusions interfere with his sleep and are causing him to have diminished interest in social activities.

Mr. Synclair is spending the majority of his time seeking assistance from the American Legal System. In addition to seeking the return of his own son, he has used his experience as a reporter to learn more about the plight of other children of divorces who are living abroad and are not allowed to have contact with the American parent. Mr. Synclair initiate a California law to facilitate the reunification of kidnapped children with their parent.

The effort of Mr. Synclair to resume his relationship with his son are commendable. However, these very efforts keep the trauma, and pain of his loss in front of him. He is under considerable stress. This stress is interfering with his ability to enjoy a social life or to fully pursue his vocation as a reporter.

I am a clinical psychologist who has been in practice since

1985. I was an adjunct professor at California State University Los Angeles where I taught courses in child development, family therapy, and child psychology. I have considerable experience and training in the treatment of victims of crime.

Sincerely,

/s/
Devora Goldberg-Lockton, Ph.D.

OCT 28 2005

No. 05-71

In The
Supreme Court of the United States

LARRY SYNCLAIR, SR.,

Petitioner,

v.

COUNTY OF FRESNO, DEPARTMENT OF CHILD ABDUCTION UNIT, DISTRICT ATTORNEY'S OFFICE, AND WILLIAM FRANK, RON HOPPER, DENNIS LEWIS, AND EDWARD HUNT, INDIVIDUALLY

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

James D. Weakley
The Law Firm of Weakley, Ratliff, Arendt & McGuire, LLP
1630 E. Shaw Ave. Suite 176
Fresno, CA 93710
(559) 221-5256
Attorney for Respondents

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

TABLE OF CONTENTS

Page

OBJECTIONS TO QUESTIONS PRESENTED FOR REVIEW 1

I. Petitioner's Question 1 1

A. Respondents' Objection 1

II. Petitioner's Question 2 2

A. Respondents' Objection 2

ARGUMENT 3

1. The Petition Does Not Support Petitioner's Position That the United States Court of Appeals for the Ninth Circuit Has Entered a Decision in Conflict with the Decision of Another United States Court of Appeals on the Same Important Matter 3

2. The Petition Does Not Address Whether the United States Court of Appeals for the Ninth Circuit Has Decided an Important Federal Question in a Way That Conflicts with a Decision by a State Court of Last Resort 7

3. The Petition Does Not Address Whether the United States Court of Appeals for the Ninth Circuit Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or Sanctioned Such a Departure by the District Court, So as to Call for an Exercise of this Court's Supervisory Power 7

MISSTATEMENT OF FACTS 8

MISAPPLICATION OF LAW 13

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

District of Columbia Court of Appeals v. Marc Feldman,
460 U.S. 462, 486 (1983). 8

Garry v. Geils,
82 F.3d 1362, 1365 (7th Cir. 1996) 3, 4

Gorzelanczyk v. Baldassone,
29 Fed.Appx. 402, 403 (7th Cir. 2002) 6, 13

Leaf v. Supreme Court of the State of Wisconsin,
979 F.2d 589, 596 (7th Cir. 1992) 3, 4

Moore v. Asheville, North Carolina,
396 F.3d 385, 392 (4th Cir. 2005) 5

Powell v. Powell,
80 F.3d 464, 467 (11th Cir. 1996) 6

Van Harken v. City of Chicago,
103 F.3d 1346, 1348-1349 (7th Cir. 1997) 3, 4

STATUTES

Supreme Court of the United States, Rule 10 3

OBJECTIONS TO QUESTIONS PRESENTED FOR REVIEW

I. Petitioner's Question 1

> "Does the *Rooker-Feldman* doctrine bar a federal district court from taking jurisdiction when an administrative decision or a non-judicial document by a local government entity circumvents the Fourteenth Amendment rights of a citizen?"

A. Respondents' Objection

Petitioner's first question is vague and does not accurately reflect the issue on review.

The District Court's decision, affirmed by the Ninth Circuit, did not decide the issue of whether a citizen's Fourteenth Amendment rights were in fact circumvented by a judicial decision or non-judicial document, and thus this language is not relevant and should be stricken. Rather, the District Court lacked subject matter jurisdiction to interpret an administrative decision that was based on a state court order, which Respondents contend is invalid. The District Court's decision did not reach the merits of the case. (See, Petition App. 4-28, District Court July 30, 2003 Order)

Further, the term, "or" in the Petitioner's Question 1 makes this question uncertain and raises two potential issues, one that pertains to an administrative decision and one that pertains to a non-judicial document.

II. Petitioner's Question 2

"Does the *Rooker-Feldman* doctrine apply when an administrative document is used to circumvent a judicial decision?"

A. Respondents' Objection

As phrased, this question is vague and insinuates that the judicial decision was both valid and circumvented.

The District Court's decision, affirmed by the Ninth Circuit, did not decide the issue of whether the underlying judicial decision was valid or circumvented. The judicial decision is believed to be void *ab initio*. In order to determine whether the administrative document circumvented the judicial decision, the Court must first determine whether the judicial decision was valid and enforceable. It is this inextricable intertwining that triggers the *Rooker-Feldman* doctrine, because it would cause a federal court to review an Order rendered by a state court.

ARGUMENT

A petition for writ of certiorari will be granted only for compelling reasons (Supreme Court of the United States, Rule 10). Petitioner does not offer a compelling reason to have this Court grant the writ for certiorari.

1. The Petition Does Not Support Petitioner's Position That the United States Court of Appeals for the Ninth Circuit Has Entered a Decision in Conflict with the Decision of Another United States Court of Appeals on the Same Important Matter

Petitioner proffers that the Ninth Circuit's affirmation of the District Court's ruling contradicts the Seventh Circuit's decisions of what applies to the *Rooker-Feldman* doctrine. (Petition p. 11) However, none of the cases relied on by Petitioner[1] arising out of the Seventh Circuit contradict the Ninth Circuit's ruling that "the federal court would have to rule on the constitutionality of the county official's actions which are 'inextricably intertwined' with the validity of a state court order."

The cases cited by Petitioner do not directly dispute Respondents' position that the *Rooker-Feldman* doctrine bars federal courts from having jurisdiction in this case. Instead, the Seventh Circuit reinforces Respondents' position.

---

[1] *Van Harken v. City of Chicago*, 103 F.3d 1346 (7th Cir. 1997); and *Leaf v. Supreme Court of the State of Wisconsin*, 979 F.2d 589, 596 (7th Cir. 1992); *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996)

In *Van Harken v. City of Chicago*, the Seventh Circuit held that a federal court could review the City of Chicago's procedures on issuing parking tickets to determine whether a violation of due process had been committed and the *Rooker-Fledman* doctrine did not apply to bar the federal court jurisdiction. *See Van Harken v. City of Chicago*, 103 F.3d 1346, 1348-1349. There was no issue of inextricable intertwining with a state court order involved in this case. Thus, this case does not contradict the Ninth Circuit's ruling.

Petitioner relies on *Leaf v. Supreme Court of the State of Wisconsin,* to support the contention that "a district court, however, may have jurisdiction when the litigants' challenge *is not* directed at a state court's judicial proceedings but rather involves a state court's administrative, legislative, or ministerial actions. The facts of *Feldman* illustrate that." *Leaf v. Supreme Court of the State of Wisconsin,* 979 F.2d 589, 596 (7th Cir. 1992).

Respondents' agree with the Seventh Circuit and emphasize that as a litigant, Respondents' challenge here is directly involved with a state court's judicial proceedings, i.e., the validity of the underlying State Court Order. Thus, this case does not contradict the Ninth Circuit's holdings but instead, affirms it.

Petitioner also relies on the language in *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996), that "if the injury resulted from the state court judgment itself, *Rooker-Feldman* directs that the lower federal courts lack jurisdiction." The Seventh Circuit prefaced this holding by explaining, "in order to determine the applicability of the *Rooker-Feldman* doctrine, the fundamental and appropriate question to ask is whether the injury alleged by the federal

plaintiff resulted from the state court judgment itself or is distinct from that judgment."

It was and is the Respondents' position that the September 2, 1999, State Court Order was void *ab initio* and unenforceable. Petitioner alleges that his injuries arise out of Respondents' non-enforcement of that Order. Therefore, Petitioner's alleged injury, said to have been caused by Respondents, resulted from the State Court judgment and is not distinct from that judgment. For the reasons set forth in the District Court's opinion, the Ninth Circuit did not depart from and does not contradict the Seventh Circuit holding.

With respect to the Fourth Circuit, Petitioner cites to *Moore v. Asheville, North Carolina,* 396 F.3d 385, 392 (4th Cir. 2005) which reads, "other courts of appeals have concluded that the *Rooker-Feldman* doctrine does not apply to administrative judgments," referring to other Circuits.

However, prior to making this assertion, the Fourth Circuit specifically stated, "The *Rooker-Feldman* doctrine *might* likewise be considered to bar a federal action from in effect reviewing state administrative agency judgments." *Id* at p. 392. In *Moore*, the "administrative judgment" at issue pertained to a citation given to a preacher who violated the City's noise ordinance, not a state court Order. Additionally, the Fourth Circuit never decided this issue because, "this issue was neither presented to the district court nor decided by it." *Ibid.* Further, the Fourth Circuit never addressed the issue of "inextricable intertwining" and did not have to determine whether the administrative action of issuing a citation conflicted with a state court order.

Thus, the Fourth Circuit's ruling does not contradict the ruling of the Ninth Circuit.

Petitioner also cites to *Gorzelanczyk v. Baldassone,*[2] 29 Fed.Appx. 402, 403 (7th Cir. 2002) in support of his position. This case was not selected for publication and is not to be cited per Seventh Circuit Rule 53. Nonetheless, Petitioner failed to establish how this case contradicts the Ninth Circuit's holding.

Lastly, Petitioner relies on the Eleventh Circuit holding in *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996), which "recognized an important limitation on the *Rooker-Feldman* doctrine when the plaintiff had no 'reasonable opportunity to raise his federal claim in state proceedings.'"

According to the petition, Petitioner first filed his federal complaint on December 6, 2001[3], before making any attempt to rectify his claims in state court. Petitioner was thereafter able to effectuate a change of venue out of the County of Fresno and to the County of San Diego where he received a modified ruling a year later on December 20, 2002. The fact that Petitioner exercised this right, is evidence that he had a "reasonable opportunity to raise his federal claims in state court," but chose not to.

The Eleventh Circuit reaffirmed the long-standing *Feldman* ruling that, "the doctrine applies not only to claims actually raised in the state court, but also to claims that were not raised in the state court but are, 'inextricably intertwined' with the state court's judgment." *Powell v. Powell,* 80 F.3d

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[2] See, "Misapplication of Law," on p. 13 of this Opposition.

[3] According to the District Court's Docket, the actual date of entry was December 11, 2001.

at p. 466. Again, the Court in *Powell* only confirms the Ninth Circuit holding.

For the reasons stated, Petitioner failed to show that the Ninth Circuit entered a decision which conflicts with the decision of another United States Court of Appeals on the same important matter, and the petition for writ of certiorari should therefore be denied.

2. The Petition Does Not Address Whether the United States Court of Appeals for the Ninth Circuit Has Decided an Important Federal Question in a Way That Conflicts with a Decision by a State Court of Last Resort

The petition is silent with respect to whether the Ninth Circuit's holding conflicts with California's highest court, the Supreme Court of California. The petition also does not address whether a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort. Therefore, the petition for writ of certiorari should be denied.

3. The Petition Does Not Address Whether the United States Court of Appeals for the Ninth Circuit Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or Sanctioned Such a Departure by the District Court, So as to Call for an Exercise of this Court's Supervisory Power

The Ninth Circuit's Ruling in those cases cited above, were criticized by Petitioner. However, nothing in the cases cited supports the position that the Ninth Circuit

departed from the accepted and usual course of judicial proceeding, but rather are quite the contrary.

The Ninth Circuit affirmed the District Court's ruling, which was in direct abidance with the United States Supreme Court's analogy that a federal district court has "no jurisdiction over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *District of Columbia Court of Appeals v. Marc Feldman*, 460 U.S. 462, 486 (1983).

Petitioner has not offered a compelling reason for this Court to grant the writ for certiorari, and therefore the petition for writ of certiorari should be denied.

MISSTATEMENT OF FACTS

In accordance with Rule 15.2 of the United States Supreme Court Rules, Respondents hereby address the following perceived misstatements of facts contained in the petition:

1. Petition at page 1 - Jurisdiction:

The Ninth Circuit entered judgment affirming the District Court's ruling on December 14, 2004, not December 6, 2004.

2. Petition Appendix at page 15 - July 30, 2003, District Court Order on Summary Judgment:

It appears that several documents attached in the Appendix to the petition are not true and correct copies of the originals, but rather reproduced copies that were re-typed in